

110 FERC ¶61,275
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New Dominion Energy Cooperative	Docket Nos.	ER05-18-000 ER05-18-001 ER05-20-000 ER05-20-001 ES05-6-000 ES05-7-000
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Old Dominion Electric Cooperative	Docket Nos.	ER05-309-000 ER05-309-001 ES05-5-000
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ORDER ACCEPTING FOR FILING AND SUSPENDING TARIFF REVISIONS AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES,
GRANTING MARKET-BASED RATE AUTHORITY AND AUTHORIZING
ISSUANCE OF SECURITIES

(Issued March 8, 2005)

1. On October 5, 2004, as amended on January 7, 2005, New Dominion Energy Cooperative (New Dominion) and Old Dominion Electric Cooperative (Old Dominion) (collectively, Applicants) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ in Docket No. ER05-18-000, changes to Old Dominion's formula rate to conform it for use by New Dominion and, in Docket No. ER05-20-000, an application for market-based rate authority, with an accompanying rate schedule, to become effective January 1, 2005, or the date on which all regulatory approvals are secured (transaction effective date). On December 7, 2004, as amended on February 4, 2005, Old Dominion filed, in Docket No.

¹ 16 U.S.C. § 824d (2000).

ER05-309-000, an application requesting acceptance of Old Dominion's initial tariff for sales to New Dominion, pursuant to section 205 of the FPA, cancellation of Old Dominion's existing tariff on file with the Commission, pursuant to section 203 of the FPA,² and waiver of the 60-day prior notice requirement.

2. In Docket Nos. ER05-18-000, ER05-18-001, ER05-309-000, and ER05-309-001, we accept Applicants' filings, suspend them for a nominal period, to become effective on the transaction effective date, subject to refund, and establish hearing and settlement judge procedures. Furthermore, we will consolidate Docket Nos. ER05-18-000, ER05-18-001, ER05-309-000, and ER05-309-001 for purposes of hearing and decision because we find that they involve common issues of fact and law. In Docket Nos. ER05-20-000 and ER05-20-001, we find that New Dominion's application satisfies the Commission's standards for market-based rate authority and will accept it for filing, effective January 1, 2005, as requested.

3. 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 of the FPA³ seeking authorization to guarantee each other's obligations and for New Dominion to issue and renew short-term debt. The Commission finds that the requested authorizations, as conditioned below, meet the standards of section 204, and we will therefore grant authorization as discussed below.

4. This order benefits customers by assuring that the wholesale rates charged by Old Dominion and New Dominion are just and reasonable.

Background

5. 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 twelve member electric distribution cooperatives serving retail customers in Virginia, Delaware, Maryland and parts of West Virginia.⁴ The twelve

² 16 U.S.C. § 824b (2000).

³ 16 U.S.C. § 824c (2000).

⁴ The Member Cooperatives of Old Dominion, which will become the Member Cooperatives of New Dominion, are: 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

(continued)

Member Cooperatives are customer-owned electric distribution cooperatives providing electric service at retail to residential, commercial and industrial consumers in established service territories. The Member Cooperatives own Old Dominion and are also its customers, purchasing substantially all of their power requirements from Old Dominion under full requirements wholesale power contracts (WPCs).

6. New Dominion is a new entity that the Old Dominion Board of Directors and the Member Cooperatives propose to create pursuant to a corporate reorganization. The Member Cooperatives will be member cooperatives of New Dominion. They will assign their respective membership interests in Old Dominion to New Dominion in exchange for membership interests in New Dominion. New Dominion thus will become the sole member of Old Dominion and sign a contract to purchase, on a take-or-pay basis, all of Old Dominion's output and services. In a related proceeding, in Docket No. EC05-1-000, Old Dominion and New Dominion have filed an application pursuant to section 203 of the FPA seeking Commission authorization for the transfer of Old Dominion's WPCs with its twelve Member Cooperatives to New Dominion.

7. The current and proposed formula rates do not include capital structure components or a return on common equity. Unlike investor-owned utilities, cooperatives develop rates that instead include a margin requirement that is expressed as a percentage of all interest paid on debt service within a given test year. This margin is a component of, and collected through, Old Dominion's formula rate and is necessary to enhance the security of a cooperative's bondholders and respond to the requirements for credit ratings. Old Dominion does not propose to change the Margins Requirement. All billing from Old Dominion to New Dominion will be reflected in New Dominion's formula rate as purchased power and classified as either demand-related or energy-related expenses.

8. In response to the Commission's December 8, 2004 data request in Docket Nos. ER05-18-000 and ER05-20-000, Old Dominion states that, based on a 2003 test year, the Old Dominion formula and the New Dominion formula will produce identical demand and energy rates, i.e., demand- and energy-related purchased power expenses billed by Old Dominion to New Dominion will be exactly the same as the sum of the various demand- and energy-related expenses calculated under the existing formula.

Cooperative; Rappahannock Electric Cooperative; Shenandoah Valley Electric Cooperative; and Southside Electric Cooperative (collectively, Member Cooperatives).

Applicants' Filings**Docket No. ER05-18-000**

9. In its filing in Docket No. ER05-18-000, New Dominion seeks re-approval of the rate schedule and formula rate currently on file for Old Dominion for use by New Dominion. The general terms of the tariff have been modified, however, to allow for changed circumstances, including the change in corporate identity, the assignment of WPCs from Old Dominion to New Dominion, and the inclusion of Old Dominion and New Dominion in the PJM Interconnection, L.L.C (PJM).

10. First, New Dominion will take all of Old Dominion's capacity and energy and be responsible for all of Old Dominion's costs. Second, New Dominion proposes to revise the formula to account for the fact that New Dominion will be subject to federal and state income taxes, unlike Old Dominion, which is a not-for-profit cooperative and exempt from income taxes. Third, because New Dominion would only be indirectly responsible for nuclear decommissioning costs through its power contract with Old Dominion, New Dominion proposes that nuclear decommissioning costs be recovered as part of Old Dominion's overall power supply charges to New Dominion rather than as a separate expense in its formula rate. According to New Dominion, such charges would no longer need to be identified as a separate item in New Dominion's formula rate, and therefore the filing removes the reference to nuclear decommissioning expense in New Dominion's rate formula. Fourth, Old Dominion currently makes separate forecasts and plans for two areas of operation (Virginia Mainland and Delmarva Peninsula). Since PJM has become the regional transmission organization (RTO) for Virginia, New Dominion proposes to revise the formula rate to provide for a single, consolidated analysis of all operations within PJM. These revisions would also modify the load forecasting methodology and the description of how power is delivered to the Member Cooperatives.

Docket No. ER05-20-000

11. In Docket No. ER05-20-000, New Dominion filed an application for market-based rate authority, with an accompanying rate schedule, which provides for the sale of capacity and energy at market-based rates. In this application, New Dominion requests authority to sell to third parties and to the Member Cooperatives at market-based rates. The proposed rate schedule also includes the Commission's market behavior rules.⁵ As

⁵ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

discussed below, New Dominion states that it satisfies the Commission's standards for market-based rate authority.

Docket No. ER05-309-000

12. As discussed above, Old Dominion currently sells wholesale full requirements generation and transmission services to the Member Cooperatives; under the corporate reorganization, New Dominion would become the sole member of Old Dominion. In its filing in Docket No. ER05-309-000, Old Dominion submitted a new tariff for its sales to New Dominion. The proposed tariff includes a formula for allocating costs between demand-related and energy-related expenses for the purposes of billing such costs to New Dominion. In addition, Old Dominion has filed a notice of cancellation for its existing tariff on file with the Commission, to become effective the day prior to the effective date of the new tariff. Old Dominion requests waiver of the Commission's 60-day prior notice requirement in order to permit the new tariff to have an effective date of January 1, 2005, and the notice of cancellation to be effective December 31, 2004.

Docket Nos. ES05-5-000, ES05-6-000, and ES05-7-000

13. In Docket Nos. ES05-5-000, ES05-6-000, and ES05-7-000, Old Dominion requests authorization to guarantee obligations of New Dominion in an amount not to exceed \$300 million at any one time. In addition, New Dominion requests authorization to guarantee obligations of Old Dominion in an amount not to exceed \$1.5 billion at any one time, and to issue and renew short-term debt in an aggregate amount not to exceed \$500 million at any one time. Old Dominion asserts that the proposed securities are essential components of the reorganization proposed in Docket No. EC05-1-000 and must be coordinated with the completion of the reorganization transaction. Old Dominion and New Dominion request that the authorizations for each to guarantee obligations of the other be exempt from the competitive bidding requirements of section 34.2 of the Commission's regulations.⁶

Notice and Responsive Pleadings

Rate Proposals: Docket Nos. ER05-18-000, ER05-18-001, ER05-309-000, ER05-309-001, ER05-20-000 and ER05-20-001

14. Notices of the Applicants' October 5, 2004 filing in Docket Nos. ER05-18-000 and ER05-20-000 and of the January 7, 2005 amendment in Docket Nos. ER05-18-001

⁶ 18 C.F.R. § 34.2 (2004).

and ER05-20-001 were published in the *Federal Register*, 69 Fed. Reg. 64,041 (2004) and 70 Fed. Reg. 3,692 (2005), with protests and interventions due on or before October 26, 2004 and January 26, 2005, respectively. On October 26, 2004, Bear Island Paper Company, L.P. (Bear Island) filed a motion to intervene, protest and a request to set the matter for hearing. On October 29, 2004, the Virginia State Corporation Commission (VSCC) filed an intervention. On January 14, 2005, NOVEC filed an intervention.

15. Notice of Old Dominion's December 7, 2004 filing and its amendment filed on February 4, 2005 in Docket Nos. ER05-309-000 and ER05-309-001 was published in the *Federal Register*, 69 Fed. Reg. 75,944 (2004) and 70 Fed. Reg. 7,727 (2005), with protests and interventions due on or before December 28, 2004 and February 14, 2005, respectively. On December 28, 2004, Bear Island filed a motion to intervene, protest, and a request to set the matter for hearing and audit. Also on December 28, 2004, as amended on January 18, 2005,⁷ Bear Island filed a motion to consolidate the proceedings in Docket Nos. EC05-1-000, ER05-18-000, ER05-20-000 and ER05-309-000. On January 12, 2005 and February 2, 2005, Old Dominion filed answers to Bear Island's submittals. 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 submittals, which it amended on February 8, 2005. On February 14, 2005, Bear Island filed an answer. On February 14, 2005 NOVEC filed comments and on February 16, 2005, NOVEC filed an answer to Old Dominion's answers.

Docket Nos. ES05-5-000, ES05-6-000, and ES05-7-000

16. Notice of Applicants' October 12, 2004 filing in Docket Nos. ES05-5-000, ES05-6-000, and ES05-7-000 was published in the *Federal Register*, 69 Fed. Reg. 62,264 (2004), with protests and interventions due on or before October 29, 2004. On January 14, 2005, NOVEC filed a motion to intervene out-of-time and protest. 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 submittals, which it amended on February 8, 2005.

⁷ On January 18, 2005, Bear Island filed an amendment to its motion to consolidate the above dockets with Old Dominion's filing in Docket No. ER05-360-000, and, on February 2, 2005, the Applicants filed a response to Bear Island's amendment. Because the filing in Docket No. ER05-360-000 will be addressed in a separate Commission order, the Commission will not further discuss these pleadings here.

Protests and Applicants' Response

17. Bear Island's protest contends that the proposed formula rate could pass added costs and higher prices to the Member Cooperatives, which could then be passed on to captive retail customers such as Bear Island. According to Bear Island, although cooperative retail customers' distribution rates are to a degree fixed, the cooperatives are authorized by statute to recover their purchased power costs through power cost adjustment clauses in their retail tariffs.⁸ Bear Island also argues that its retail rates would increase substantially as a result of Old Dominion's proposal to sell at other than cost-of-service formula rates to New Dominion. Bear Island states that the Commission has held that affiliate abuse could exist if the affiliated wholesale purchaser has requirements customers under an existing rate schedule that allows for a pass-through of costs.⁹

18. In its December 28, 2004 motion to consolidate, Bear Island contends that the proposed formula rate for sales from Old Dominion to New Dominion in Docket No. ER05-309-000 was filed in direct response to the objections raised by Bear Island and the VSCC in Docket No. ER05-18-000. Bear Island urges the Commission to consolidate the proceedings in Docket Nos. EC05-1-000, ER05-18-000, ER05-20-000 and ER05-309-000 because: (1) the substance is closely inter-related as they are both part of Old Dominion's plan to establish New Dominion as an intermediary between itself and its Member Cooperatives; (2) similar or identical factual issues are raised; (3) consolidation would avoid problems raised by the timing of the Commission's decision if they are considered separately (e.g., the potential for a gap in the regulatory approvals needed to govern sales to retail cooperatives); and (4) there will be no delay or prejudice imposed by the consolidation of these cases.

19. Applicants' answer to Bear Island's motion to consolidate disputes Bear Island's assessment that the parties to the proceedings are identical because the Commission has not ruled on Bear Island's opposed motion to intervene, meaning that Bear Island is not yet a party to the proceedings in the dockets it wishes to be consolidated. Applicants also noted that, while VSCC had intervened, it had not taken a position on the New Dominion proposal and that NOVEC has not yet intervened in all of the proceedings Bear Island

⁸ See Va. Code § 56-582.B.B

⁹ See, e.g., *Illinova Power Marketing, Inc.*, 88 FERC ¶ 61,189 at 61,649 n.2 (1999); *AmerGen Energy Co.*, 90 FERC ¶ 61,080 at 61,282 (2000).

sought to consolidate.¹⁰ Consequently, according to Applicants, consolidation could create confusion as to who is a party to what proceeding. In addition, Applicants acknowledge that the subject matter of the two proceedings is interrelated but contend that it is not the same; thus consolidation could result in confusion. Applicants contend that Bear Island's list of "factual issues" that are common to these dockets is merely a restatement of the arguments it has already made in its request that these issues be set for hearing, which have already been addressed. Applicants also contend that the timing should not present a problem because Applicants have sought to make it clear that the filings in these dockets are independent. Finally, Applicants contend that the absence of delay or prejudice does not constitute a reason to grant the motion to consolidate.

20. NOVEC, which is the largest of Old Dominion's twelve Member Cooperatives, filed a protest contending that the restructuring proposed in the application is incomplete as filed and that the application contains a number of misrepresentations. First, NOVEC protests Old Dominion's proposal because it does not mention that NOVEC's approval of the restructuring was premised on Old Dominion's promise to renegotiate the WPCs to remove the provision that the WPCs are "full requirements" contracts. The removal of this condition would allow NOVEC (and other Member Cooperatives) the flexibility to acquire power and energy over and above that available from NOVEC's share of Old Dominion's existing resources from whatever alternate suppliers or resources NOVEC may choose. NOVEC contends that blocking Member Cooperatives ability to purchase from competing suppliers is inconsistent with Applicants' statement that that its proposal creates no barriers to entry or other adverse effects on competition. Second, NOVEC notes 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 & Poor's 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. Third, NOVEC supports Bear Island's characterization of Old Dominion's Member Cooperatives as "captive cooperative customers" and rejects Old Dominion's assertion that such captivity is voluntary. Fourth, NOVEC contends that the proposed revisions to the WPCs negate the no-assignment provision in the WPCs and that the WPCs require further revisions to prevent New Dominion from engaging in discriminatory or preferential treatment of Member Cooperatives in market-based deals. Finally, NOVEC maintains that the formula rates must be modified to allocate New Dominion's costs, including costs associated with New Dominion's obligations pursuant to the requested financing

¹⁰ The Commission notes that, as discussed below, NOVEC subsequently intervened in the proceedings.

authority, in a manner consistent with each Member Cooperative's rights and obligations under the yet-to-be revised WPCs.

21. NOVEC urges the Commission to set these matters for hearing to allow the parties time to work among themselves and, if necessary, with the aid of a settlement judge. NOVEC suggests that the Commission consider allowing the parties a period of up to 90 days to resolve these matters on their own, subject to any party having the right to ask for the appointment of a settlement judge. If settlement judge procedures fail to culminate in an agreed-upon restructuring plan, then NOVEC requests that the matter proceed to hearing.

22. Old Dominion responds that it is under no obligation to amend NOVEC's WPC and flatly denies having agreed to do so. Old Dominion claims that there is nothing in the WPCs that requires modification or renegotiation and that the WPCs allow for assignment with the appropriate prior authorizations, to which NOVEC has contractually agreed. Old Dominion contends that NOVEC's protest is contrary to its contractual obligations and is an improper effort to submit a complaint about its WPC. Old Dominion contends that, if the Commission does not reject NOVEC's attempt to force modification of its WPC, NOVEC will gain a right to unilaterally modify its WPC in violation of the *Mobile-Sierra*¹¹ public interest standard and burden of proof that NOVEC would face if it filed a complaint under section 206 to reform the WPC. Accordingly, Old Dominion requests that the Commission reject all other aspects of NOVEC's protest and refuse its request for Commission-supervised renegotiation of its WPC, a hearing or other unnecessary proceedings.

23. In its amended answer to NOVEC, Old Dominion further disputes NOVEC's assertion that Standard & Poor's reduced Old Dominion's credit rating in part because of the risk associated with Old Dominion's proposed restructuring. Old Dominion contends that Standard & Poor's Research Bulletin issued on February 5, 2005 disproves NOVEC's claim regarding the reorganization's alleged adverse effects on Old Dominion's credit rating.

24. Bear Island filed an answer and renewed request for hearing, and NOVEC filed comments and an answer to Old Dominion's amended answer. Bear Island and NOVEC contend that Old Dominion's amendment shows that its application remains incomplete. Bear Island notes that Old Dominion has no studies or empirical analyses to support its operations and maintenance expense assignments as demand- or energy related. In its comments, NOVEC adds that further approvals from the Member Cooperatives will be

¹¹ *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*).

necessary to implement the power agreement between Old Dominion and New Dominion. In its answer, NOVEC contends that Old Dominion has admitted that the WPC 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 WPC, as evidenced by Old Dominion Board of Directors' resolution reaffirming its commitment to renegotiate the WPC. NOVEC also disputes Old Dominion's allegation that NOVEC is in breach of the Reorganization Agreement. Finally, NOVEC argues that Old Dominion's assertion that the credit downgrade by Standard & Poor's was not due to the reorganization is false and, as further support, attaches a second report issued by Moody's Investor Services on January 31, 2005, which states that Moody's views the reorganization "negatively from a credit perspective".

Discussion

Procedural Issues

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.214 (2004), the timely, unopposed interventions serve to make the entities that filed them a party to the proceedings in which they intervened.

26. Further, while Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a) (2004), prohibits answers to protests and to answers unless otherwise permitted by the decisional authority. We find that good cause exists to allow the various answers because they provide additional information that has assisted in the decision-making process.

Docket Nos. ER05-18-000, ER05-18-001, ER05-309-000, and ER05-309-001

27. Our preliminary analysis indicates that Applicants' filings have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we accept Applicants' filings, suspend them for a nominal period, to become effective on the transaction effective date, subject to refund, and establish hearing and settlement judge procedures.¹² We will consolidate

¹² While Old Dominion argues that the filings, at least in part, are initial rates, we disagree. An initial rate requires a new service to a new customer, and neither is the case here. Rather, Applicants are simply inserting New Dominion between Old Dominion and the Member Cooperatives. Presently, Old Dominion provides generation, transmission and other services to the Member Cooperatives. In the future, Old Dominion will provide these services to New Dominion, who, in turn, will provide them to the Member Cooperatives. To view these filings as initial rates would elevate form over substance.

these dockets for hearing and decision because we find that they have common issues of fact and law.

28. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes 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.¹³ 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.¹⁴ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

29. We will deny waiver of the 60-day prior notice requirement. The Commission has previously stated that, absent a strong showing of good cause, we will deny requests for waiver of prior notice for rate increases that do not implement a contract requirement, such as increases in requirements, coordination, and transmission rates.¹⁵ As we held recently in a related proceeding in Docket No. ER05-360-000,¹⁶ Old Dominion's proposal to modify the classification of certain costs as between demand-related and energy-related will result in some customers experiencing an increase in rates. Therefore, we will deny the requests for waiver of our 60-day prior notice requirement.

¹³ 18 C.F.R. § 385.603 (2004).

¹⁴ 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, available at: <http://www.ferc.gov/about/offices/oalj/oalj-dj.asp>.

¹⁵ *Central Hudson Gas & Electric Corp., et al.*, 60 FERC ¶ 61,106 at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

¹⁶ *Old Dominion Electric Cooperative*, 110 FERC ¶ 61,165 at P 4 (2005).

Docket Nos. ER05-20-000 and ER05-20-001**Market-Based Rate Authorization**

30. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.¹⁷ As discussed below, we conclude that New Dominion satisfies the Commission's standards for market-based rate authority.

31. In its order issued in *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018, order on reh'g, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power. New Dominion performed the generation market power screens using as the relevant geographic markets the control area markets of Dominion Virginia Power, PJM East, PJM West and AEP East, which integrated into PJM October 1, 2004.¹⁸ Because PJM constitutes a single geographic market for the purpose of performing the generation market power screens,¹⁹ the Commission reviewed New Dominion's generation market power screens in the PJM and Dominion Virginia Power control areas. The Commission's review indicates that New Dominion passes the pivotal supplier and wholesale market share screens in both geographic markets. Accordingly, the Commission finds that New Dominion satisfies the Commission's generation market power standard for the grant of market-based rate authority.

32. New Dominion states that its cooperative affiliate Old Dominion owns only limited transmission facilities that are connected to and controlled by the relevant control area operator. Based on New Dominion's representation, the Commission finds that New Dominion satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

¹⁷ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996), Letter Order Approving Settlement, 79 FERC ¶ 61,149 (1997); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

¹⁸ *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,318 (2004).

¹⁹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 187.

33. New Dominion states that neither it nor any of its affiliates owns or controls any sites for the construction of new generating capacity, interstate or intrastate natural gas pipelines, or other essential resources or inputs that could be used to restrict market entry by competing power suppliers. Based on this representation, we are satisfied that neither New Dominion nor any of its affiliates can erect barriers to entry.

34. In determining whether to grant market-based rate authority, the Commission considers whether affiliate abuse or reciprocal dealing may exist. However, the Commission has held that affiliate abuse concerns do not exist in a cooperative structure, because a cooperative's ratepayers (i.e., the Member Cooperatives) are also its owners.²⁰ Therefore, Bear Island's allegations concerning the potential for affiliate abuse are without merit. Accordingly, the Commission finds that New Dominion satisfies the Commission's concerns regarding affiliate abuse.

35. Finally, the Commission finds that Bear Island's protest insofar as it concerns potential increases in retail rates is not relevant to our assessment of New Dominion's application for market-based rate authority. The Commission will instead address the effect on rates of the proposed transaction in Docket No. EC05-1-000, which is being issued concurrently with this order.

Waivers, Authorizations and Reporting Requirements

36. New Dominion requests the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to sections 35.12(a), 35.13(b), 35.15 and 35.16; (2) waiver of Parts 41, 101 and 141 of the Commission's accounting and periodic reporting requirements, except as to sections 141.14 and 141.15; (3) permission to make abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; and (4) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of obligations or liabilities as guarantor, indorser, surety or otherwise in respect of any security of any person.

²⁰ See, e.g., *Sierra Southwest Coop. Servs., Inc.* 95 FERC ¶ 61,310 (2001); *Old Dominion Electric Cooperative*, 81 FERC ¶ 61,044 (1997); *Hinson Power Company*, 72 FERC ¶ 61,190 (1995).

37. We will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.²¹ Notwithstanding the waiver of the accounting and reporting requirements here, we expect New Dominion to keep its accounting records in accordance with generally accepted accounting principles.

38. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.²² Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²³ Accordingly, New Dominion must file its first Electric Quarterly Report no later than 30 days after the first quarter New Dominion' market-based rate tariff is in effect.²⁴

²¹ It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141) as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities, (18 C.F.R. Part 34). *See Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, 67 Fed. Reg. 67,691 (October 10, 2002), FERC Stats. & Regs. ¶ 32,558 at P 23 and P 24 (2002).

²² *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR submission system software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

²³ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004).

²⁴ Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

39. New Dominion must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.²⁵ A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

40. Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, New Dominion is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

41. In addition, New Dominion is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

Docket Nos. ES05-5-000, ES05-6-000, and ES05-7-000

42. Section 204(a) of the FPA provides that requests for authority to issue securities or to assume liabilities shall be granted if the Commission finds that the issuance:

- (a) is for some lawful object, within the corporate purposes of the applicant, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.²⁶

The Commission finds that the requested authorizations, as conditioned below, meet the standards of section 204.

²⁵ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2004), FERC Stats. & Regs. ¶ 31,175 (2005) (Order No. 652).

²⁶ 16 U.S.C. § 824c(a) (2000).

43. The Commission finds that Applicants' proposed securities issuances are for lawful objects within their corporate purposes and are necessary, appropriate and consistent with their performance as public utilities. Old Dominion states that it will guarantee the obligations of New Dominion in connection with the credit support needed by New Dominion to facilitate New Dominion's business operations. New Dominion will guarantee Old Dominion's obligations in connection with the credit support needed by Old Dominion to facilitate Old Dominion's business operations. Proceeds from New Dominion's issuance of short-term debt under the requested authorization will be used to provide capital for general corporate expenditures.

44. Guaranteeing obligations of jurisdictional public utility affiliates and providing working capital to meet a public utility's general corporate expenditures are lawful objects routinely practiced in the electric industry. The Commission also recognizes that the borrowings and proposed securities are a vital part of the reorganization plan and that Old Dominion and New Dominion would not be able to complete their reorganization without the proposed authorization. Further, with the conditions ordered below, such authorization should not impair Old Dominion's or New Dominion's ability to provide service as a public utility.

45. As a result, the Commission will conditionally authorize: (1) Old Dominion to guarantee obligations of New Dominion in an aggregate amount not to exceed \$300 million at any one time; and (2) New Dominion to guarantee obligations of Old Dominion in an aggregate amount not to exceed \$1.5 billion at any one time, and to issue and renew short-term debt in an aggregate amount not to exceed \$500 million at any one time, upon the terms and conditions and for the purposes specified in the application, subject to the restrictions the Commission imposed on secured and unsecured debt in *Westar Energy, Inc.*²⁷

²⁷ In *Westar Energy, Inc.*, 102 FERC ¶ 61,186, *order on reh'g*, 104 FERC ¶ 61,018 (2003) (*Westar*), the Commission announced four restrictions that would be imposed on all future public utility issuances of secured and unsecured debt to prevent, among other things, public utilities from borrowing substantial amounts of money and using the proceeds to finance non-utility businesses to the detriment of utility customers. First, public utilities seeking authorization to issue debt backed by a utility asset must use the proceeds of the debt for utility purposes. Second, if any utility assets that secure debt issuances are divested or "spun off", the debt must follow the asset and also be divested or spun off. Third, if any of the proceeds from unsecured debt are used for non-utility purposes, the debt must follow the non-utility assets. Specifically, if the non-utility assets are divested or spun-off, then a proportionate share of the debt must follow the divested or spun-off non-utility asset. Finally, if utility assets financed by unsecured debt are

(continued)

46. NOVEC states that since New Dominion's financings will largely depend on its members' revenues and credit under the WPCs assigned to New Dominion, this application should be considered in connection with the revisions to the WPCs yet to be negotiated as well as to the corresponding changes that will need to be made to New Dominion's proposed rate formulas to reflect the renegotiated WPCs. Specifically, NOVEC wants to ensure that it will not be exposed to any New Dominion obligations that are unrelated to NOVEC's rights and obligations under the yet-to-be revised WPCs. We disagree with NOVEC that its concerns involving renegotiation of its WPC and New Dominion's proposed formula rates must be resolved as a precondition to granting the requested section 204 authorization. NOVEC's concerns focus on the allocation of cost responsibility among New Dominion's members and are more appropriately addressed in the proceeding involving New Dominion's proposed formula rates, which we have set for hearing and settlement judge procedures.

The Commission orders:

(A) In Docket Nos. ER05-18-000, ER05-18-001, ER05-309-000, and ER05-309-001, we accept Applicants' filings, suspend them for a nominal period, to become effective on the transaction effective date, subject to refund.

(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 Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket Nos. ER05-18-000, ER05-18-001, ER05-309-000 and ER05-309-001. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), 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 by telephone within five (5) days of the date of this order.

divested or spun-off to another entity, then a proportionate share of the debt must also be divested or spun off.

(D) Within sixty (60) days of the issuance of this order, 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 Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. 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) In Docket Nos. ER05-20-000 and ER05-20-001, New Dominion's proposal to allow New Dominion to sell energy and capacity at market-based rates is hereby accepted for filing.

(G) New Dominion's request for waiver of Parts 41, 101 and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§141.14, 141.15 (2004) (providing for the filing both of the Form No. 80 and of the Annual Conveyance Report).

(H) Within 30 days of the date of the issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by New Dominion should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2004).

(I) Absent a request to be heard within the period set forth above, New Dominion is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of New Dominion, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(J) Until further order of this Commission, the requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving New Dominion. Any such person shall instead file a sworn application providing the following information: (1) his or her full name and business address; and (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(K) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of New Dominion's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(L) New Dominion's request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(M) Consistent with the procedures the Commission adopted in Order No. 2001, New Dominion must file electronically with the Commission Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.

(N) New Dominion is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

(O) New Dominion is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

(P) Old Dominion is hereby granted authorization to guarantee obligations of New Dominion in an aggregate amount not to exceed \$300 million at any one time, and New Dominion is hereby granted authorization to guarantee obligations of Old Dominion in an aggregate amount not to exceed \$1.5 billion at any one time, and to issue and renew short-term debt in an aggregate amount not to exceed \$500 million at any one time, upon the terms and conditions and for the purposes specified in the application.

(Q) The authorization granted in Ordering Paragraph (P) is effective as of the date that the transaction authorized in the order to be issued concurrently in Docket No. EC05-1-000 is consummated and terminates two years thereafter.

Docket No. ER05-18-000, *et al.*

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(R) The authorization granted in Ordering Paragraph (P) is subject to the restrictions established in *Westar*, as discussed in the body of this order.

(S) Old Dominion and New Dominion's requested waiver of the Commission's competitive bidding and negotiated placement requirements at 18 C.F.R. § 34.2 (2004) is hereby granted.

(T) Old Dominion and New Dominion must file a Report of Securities Issued, under 18 C.F.R. §§ 34.10 and 131.43 (2004), no later than 30 days after the sale or placement of the securities.

(U) The authorization granted in Ordering Paragraph (P) above is without prejudice to the authority of the Commission with respect to rates, services, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may come before the Commission.

(V) Nothing in this order shall be construed to imply any guarantee or obligation on the part of the United States with respect to any security to which this order relates.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.