119 FERC ¶ 61,253
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Old Dominion Electric Cooperative
New Dominion Energy Cooperative

Docket No. EC05-1-003

OPINION NO. 491-A

ORDER DENYING REHEARING

(Issued June 7, 2007)

1. In this order we deny the request by Northern Virginia Electric Cooperative (NOVEC) for rehearing of the Commission's determinations in Opinion No. 491.[1] In Opinion No. 491, the Commission approved the proposed reorganization of Old Dominion Electric Cooperative (Old Dominion) under section 203 of the Federal Power Act (FPA).[2] The Commission also approved Old Dominion's assignment of its jurisdictional wholesale power contracts to newly created New Dominion Energy Cooperative (New Dominion), which would then become the Member Cooperatives' full requirements power supplier.[3] Opinion No. 491 focused on the issue set for hearing in this matter, *i.e.*, whether Old Dominion's slight credit downgrade by one rating agency would raise its rates and whether the downgrade was due to the proposed transaction.[4]

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[1] *Old Dominion Elec. Coop.*, 117 FERC ¶ 61,313 (2006) (Opinion No. 491).

[2] 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005). EPAct 2005 did not become effective, however, until after this application was filed, and it thus does not apply here.

[3] Member Cooperatives include: A&N Electric Cooperative; BARC Electric Cooperative; Community Electric Cooperative; Choptank Electric Cooperative; Delaware Electric Cooperative; Mecklenburg Electric Cooperative; Northern Neck Electric Cooperative; NOVEC; Prince George Electric Cooperative; Rappahannock Electric Cooperative; Shenandoah Valley Electric Cooperative; and Southside Electric Cooperative.

[4] *Old Dominion Elec. Coop.*, 110 FERC ¶ 61,274, at P 23 (2005) (Hearing Order).

The Commission upheld the finding of the Presiding Administrative Law Judge (ALJ) that it is unlikely that the credit downgrade could raise rates.

I. Background

2. The transaction at issue here is described in detail in the Hearing Order. Briefly, Old Dominion and New Dominion (jointly, Applicants) requested Commission authorization to assign Old Dominion's wholesale power contracts with its twelve electric distribution cooperative members to New Dominion, which would then become the Member Cooperatives' full requirements power supplier. The Member Cooperatives own Old Dominion and are also its customers, purchasing almost all of their power from it. All of Old Dominion's costs and expenses are recovered through charges to its Member Cooperatives. New Dominion will buy all of the output of Old Dominion's electric generation facilities and resell the power to the Member Cooperatives at cost-based rates. New Dominion also expects to make other wholesale power sales.

3. The Commission reviewed the application to determine whether the proposed change would be "consistent with the public interest" under section 203(a) of the FPA.[5] The Commission assessed (a) the effect on competition; (b) the effect on rates; and (c) the effect on regulation.[6] The Commission concluded that the proposed transaction will not adversely affect competition or regulation.[7]

4. However, one of the Member Cooperatives, NOVEC, alleged that Old Dominion had experienced a downgrade in its credit rating, in part because of the risk associated with the proposed restructuring, which is likely to increase its rates. The Commission found that there was an issue of material fact as to whether the proposed restructuring would adversely affect rates and set that issue for hearing.[8]

5. The ALJ found that the record evidence did not show that Old Dominion's credit downgrade from A+ to A by one of three rating agencies is likely to affect interest rates charged to Old Dominion/New Dominion. She interpreted the Commission's Hearing Order to mean that the test is not whether it is possible that rates will be raised, since

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[5] 16 U.S.C. § 824b(a) (2000).

[6] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*).

[7] Hearing Order, 110 FERC ¶ 61,274, at P 13-14, 26.

[8] *Id.* at P 23 and Ordering Paragraph (A).

anything is possible, but whether there is a "reasonable probability" that the credit downgrade will have that effect.[9]

6. The ALJ noted that it is uncontested that Old Dominion's credit downgrade has had no effect on rates as of the date of the Initial Decision. She also examined the downgrade's likely effect on Old Dominion's rates with respect to future debt issuances. She found that Old Dominion's witnesses credibly testified that Old Dominion has no current plans to seek new financing in the bond markets. Moreover, the ALJ noted that Trial Staff witness Marina Kantor accepted the testimony of Old Dominion's witnesses as reasonable. Furthermore, NOVEC did not produce any substantial evidence that the Old Dominion Board had approved any future project that requires long-term financing; NOVEC's evidence merely showed that the Board was considering a number of possible projects. The ALJ found that Old Dominion's overall credit rating remains in the positive "A" category and that unless it is lowered again, there is no reason to assume that Old Dominion/New Dominion will be required to pay more for credit in the future.[10]

7. The Commission adopted the fundamental reasoning of the ALJ in Opinion No. 491. We found that Old Dominion had carried its initial burden of showing that the proposed transaction will not raise rates. We also found that the burden of going forward thus shifted to NOVEC to demonstrate an insufficiency in Applicants' case. Any argument NOVEC made must be supported by substantial evidence.

8. The Commission affirmed the ALJ's reading of the phrase "could raise rates" in the Hearing Order to mean that there is a reasonable probability that the downgrade will raise rates. It noted that an applicant does not have to show beyond a reasonable doubt that a proposed transaction will not result in higher rates, but rather that it is not reasonably probable that higher rates will result.

9. On the basis of its examination of the record evidence, the Commission found that it is unlikely that the credit downgrade (even if caused by the proposed reorganization) is significant enough to lead to higher rates. The Commission found that Old Dominion's credit downgrade from A+ to A by one of three credit rating agencies, Standard & Poor's (S&P), was simply a realignment of the credit agencies' ratings, since S&P's rating after the downgrade resembled that of Moody's Investors Service (Moody's) and Fitch Ratings

[9] *Old Dominion Elec. Coop.*, 114 FERC ¶ 63,019, at P 31 (2006) (Initial Decision).

[10] *Id.* at P 32-35.

(Fitch).[11] The Commission noted that even after the downgrade, Old Dominion's credit ratings are within the same, relatively high, grade.

10. In response to NOVEC's argument that a Banc of America representative price analysis regarding the spreads between interest rates for U.S. Treasury securities and companies comparable to Old Dominion was inadmissible hearsay evidence,[12] the Commission stated that the ALJ correctly found that the issue was not whether the evidence is hearsay, since hearsay is admissible in administrative proceedings, but whether the evidence is relevant. However, we also stated that it did not appear that the price spread analysis played any substantial role in the ALJ's decision, and that it did not play a substantial role in our ruling. The Commission noted that Old Dominion proffered the evidence to show that Banc of America did not alter the group of companies with ratings and business profiles considered comparable to Old Dominion after the downgrade, not to estimate the price at which Old Dominion's bonds would trade.

11. Finally, the Commission found that because the evidentiary record supports the conclusion that the credit downgrade will not raise rates, it did not need to address whether the credit downgrade was due to the proposed transaction (i.e., the reorganization).

II. Request for Rehearing

A. Due Process and Applicable Standard

12. NOVEC argues that the Commission violated its due process rights in Opinion No. 491 by redefining the issue set for hearing as whether "there is a reasonable probability that the downgrade *will* raise rates" instead of whether the downgrade "*could* raise rates," as specified in the Hearing Order.[13] NOVEC maintains that it did not receive adequate notice of this change. It states that due process requires that an agency setting a matter for a hearing provide the parties "with adequate notice of the issues that would be

[11] Ex. S-1 at 9 (Kantor); Ex. ODC-14 at 9-10 (Neuhedel); *see also* Ex. ODC-14 at 8-9 (investors view such credit ratings in the aggregate).

[12] *See* Ex. ODC-6. The analysis estimates the risk premium for Old Dominion's bonds by examining secondary market spreads of United States treasury securities to traded bonds of companies with ratings and business profiles that Banc of America considers to be comparable to Old Dominion. Old Dominion's bonds do not trade frequently in the secondary market. Banc of America provides Old Dominion with periodic estimates of the secondary market spread to U.S. treasuries at which Old Dominion's bonds would trade.

[13] NOVEC Rehearing Request at 4 (emphasis in original).

considered and ultimately resolved at a hearing."[14] NOVEC argues that the difference between the issue set for hearing and the issue ruled on in Opinion No. 491 deprived it of adequate notice of the issue to be resolved at the hearing.

Commission Determination

13. NOVEC quotes our framing of the issue in the Hearing Order somewhat selectively when arguing that we violated its due process rights. The issue we set for hearing was "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."[15] The issue therefore was whether there would be an adverse effect on rates. The qualifying language that follows the statement of the issue simply further focuses the inquiry on the effects of credit downgrade; it does not alter the standard of proof.[16] Regardless of how the narrower question is expressed, the issue is whether there would be an adverse effect on rates, and proving that the credit downgrade could adversely affect rates does not prove that it would.[17] However, the full answer to NOVEC's argument involves more than matters of textual interpretation.

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[14] *Id.* at 26 (*citing Public Service Com'n of Kentucky v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005)).

[15] Rehearing Order at P 23 (emphasis supplied).

[16] As discussed below, the applicable standard of proof is one of substantial evidence, and it is established by statute. The use of "could" instead of "would" in this context is simply a matter of style and cannot be read as somehow overriding statutory requirements.

[17] The principle of construction known as *noscitur a sociis* ("it is known from its associates") also addresses issues of this type. It provides that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. See *Black's Law Dictionary* 1084 (7th ed. 1999). The phrase "whether the proposed transaction would adversely affect rates" has been used in virtually all of our orders under FPA section 203 since the issuance of the *Merger Policy Statement* and is well understood. Traditional principles of construction, as embodied in the doctrine of *noscitur a sociis*, require that "could" in this context be understood in a way that is consistent with the well-understood phrase "whether the proposed transaction would adversely affect rates." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (holding that "words grouped in a list should be given a related meaning"); *Neal v. Clark*, 95 U.S. 704, 708-09 (1878) (finding that "the coupling of words together shows that they are to be understood in the same sense").

14. As the Commission noted in Opinion No. 491, in arguing that the issue set for hearing was whether the credit downgrade "could" adversely affect rates, NOVEC is in effect saying that the Applicants must show beyond a reasonable doubt that the proposed transaction will not adversely affect rates. An inquiry into whether something could occur is an inquiry into whether it is possible at all, in this case whether it is conceivable that a credit downgrade could lead to higher interest rates that could, in turn, result in higher wholesale rates. To demonstrate that the downgrade could not raise rates, which NOVEC maintains was the task we set for the Applicants, would require a demonstration that a reasonable person would find it inconceivable that the downgrade would raise them.

15. The Commission stated in Opinion No. 491 that an "applicant does not have to show beyond a reasonable doubt that a proposed transaction would not result in higher rates, but rather that it is not reasonably probable that higher rates will result."[18] NOVEC maintains that it did not have notice of this fact, but that is not true. Section 313(b) of the FPA states that a "finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive."[19] In other words, proceedings such as the hearing in this case are subject to a substantial evidence standard, which requires a lesser showing than the beyond a reasonable doubt standard that applies in criminal proceedings. NOVEC was thus on notice as to the standard of proof that applies to Commission findings of fact, and this refutes NOVEC's claim that its due process rights have been violated.

16. A brief consideration of the meaning of substantial evidence helps to explain how the notice the statute provides forecloses NOVEC's interpretation of the Hearing Order. The Supreme Court has stated that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[20] Therefore, substantial evidence "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[21] Finally, the Supreme Court has stressed that an

[18] Opinion No. 491, 117 FERC ¶ 61,313 at P 26.

[19] 16 U.S.C. § 825l(b) (2000).

[20] *Universal Camera Corp. v. National Labor Relations Bd.,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938)).

[21] *Id.* (quoting *Labor Bd. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

assessment of whether there is substantial evidence to support a conclusion must be based on the record as a whole.[22]

17. NOVEC ignores these basic requirements and advances a textbook example of something that the Supreme Court has maintained cannot qualify as substantial evidence. The statement that the credit downgrade "could" raise rates amounts to "a suspicion of the existence of the fact to be established." It does not mean that this effect of the downgrade is an established fact. The basis of NOVEC's argument is the proposition that "*any* credit downgrade can effect a significant impact on a company's cost of debt because it signals to possible investors that the company poses a greater risk. . . ."[23] NOVEC supports this proposition through references to Applicants' Witness Simmons, who testified that "all else being equal, a credit downgrade will surely result in higher long-term borrowing costs in the future" and Applicants' Witness Neuhedel, who stated that "generally, lower ratings lead to higher cost of debt."[24] NOVEC then develops a line of reasoning that proceeds as follows. It first argues that "all else being equal, a higher cost of debt will increase rates." NOVEC then maintains that "Applicants are highly likely to issue new debt," and it concludes that this demonstrates "[e]ven under the Commission's revised 'reasonable probability' standard . . . that the downgrade is likely to result in increased rates."[25]

18. This argument confuses conclusions based on specific facts with generalizations used to draw those conclusions. The statement that "all else being equal, a lower credit rating means higher borrowing costs" is simply a theory about human conduct. It is based on the logical premise that lenders are more willing to lend the more likely it is that they will be repaid. This premise is then combined with the observation that lowered credit ratings generally suggest that the likelihood of repayment has fallen. The inference drawn is that lower credit ratings generally lead to higher interest rates. However, the inference is valid only under the express assumption that all else remains equal, and experience shows that it seldom does. Many other factors can and do affect the willingness of lenders to lend. The ALJ stated the point aptly when she wrote "[o]bviously it is possible that Old Dominion may be forced to pay higher interest rates

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[22] *Id.* at 488.

[23] NOVEC Rehearing Request at 5 (emphasis in original).

[24] *Id.* at 14, n. 40.

[25] *Id.* at 5.

for new financing, but it is also possible that the S&P downgrade will have lost its impact by then, or that any number of variables will occur which could offset the lower rating."[26]

19. There may indeed be circumstances where a credit downgrade outweighs other factors to such a degree that it probably would have an adverse effect on rates. However, that must be shown on the basis of substantial evidence, and no such showing has been made in this case. General propositions about human behavior of the type NOVEC points to can be valuable in assessing the significance of specific facts. However, they cannot be substituted for such an assessment.

20. That, however, is what NOVEC attempts to do. NOVEC's Rehearing Request devotes little attention to actual facts and how its theory of lender behavior helps us understand the significance of those facts. When it does discuss facts, it is for the purpose of arguing that the credit downgrade could adversely affect rates rather than arguing that it is reasonably likely that it would raise them. NOVEC thus states that "[r]ather than relying on the credit reports themselves," the Commission looked to "irrelevant information," the example being representative spreads to treasuries on traded bonds.[27] However, the issue is not what the credit reports say, but the potential effects of what they say. This is not something that can be known through "relying on the credit reports themselves." If the reports spoke for themselves, as NOVEC seems to think, there would have been no need for a hearing. NOVEC elsewhere criticizes as "irrelevant" the Commission's observation that Old Dominion's credit rating after the downgrade remains within the same "relatively high" grade. NOVEC states that the "real issue is what the downgrade said to potential investors. . . ."[28] However, what the downgrade said to investors depends on a number of facts and circumstances. Following the downgrade, Old Dominion's debt remained within a range commonly referred to as investment grade. Whatever the downgrade said to investors, it was certainly something very different than would be said by a downgrade that signals a high likelihood of default. The point here is simply that such matters must be assessed in light of the specific facts presented in the record as a whole, and this NOVEC does not do.[29]

[26] Initial Decision, 114 FERC ¶ 63,019 at P 34.

[27] NOVEC Rehearing Request at 16.

[28] *Id.* at 19.

[29] In fact, NOVEC states in response to being faulted for failing to support its arguments empirically that "[t]here is no evidence supporting the conclusion that the downgrade will not affect the costs of future financings." *Id.* at 19. This attempt at a negative proof simply highlights NOVEC's lack of factual support for its argument.

B. Commission Precedent on the Applicable Standard

21. NOVEC maintains that Commission precedent supports its argument that the issue set for hearing was whether the downgrade *could* raise rates. Specifically, the Commission has stated that it has an obligation to protect wholesale ratepayers "from the *possible* adverse effects of the merger," and it promotes mechanisms that will protect ratepayers "from *any* adverse rate impacts resulting from the merger for a significant period of time."[30] NOVEC states that the Commission failed to explain this departure from its precedent.

Commission Determination

22. By referring to "possible" adverse effects and "any" adverse effects, NOVEC argues that applications under FPA section 203 must demonstrate that a proposed transaction could not possibly have an adverse effect on ratepayers. But the Commission has made clear when discussing mitigation of the adverse effects of a merger that it is "statutorily obligated . . . to consider whether any conditions of any kind are necessary and appropriate *on the basis of the particular facts demonstrated by substantial evidence in the record of that case*."[31] The statements cited by NOVEC do not address the burden of proof. Rather, they refer to "any" or "possible" adverse effects shown by substantial evidence to be reasonably probable. The Commission's decision in this case does not depart from existing precedent. NOVEC has simply misread that precedent.

C. Ratepayer Protections and Burden of Proof

23. NOVEC argues that the Commission abdicated its statutory obligation to ensure that ratepayers are protected from the transaction's adverse effect on rates. It says that the Commission requires applicants to propose adequate ratepayer protections in any application under section 203 of the FPA. NOVEC states that Applicants neither proposed any ratepayer protection mechanism nor explained how the Member Cooperatives will be protected if the anticipated benefits of the proposed reorganization do not materialize. This was contrary to Commission precedent and was done without an explanation for the Commission's departure from precedent. NOVEC states that failure to provide such an explanation renders the Commission's decision arbitrary and

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[30] *Id.* at 4 (*citing* to *Merger Policy Statement* at 30,122-123 (emphasis supplied by NOVEC)).

[31] *Southern California Edison Co. and San Diego Gas and Electric Co.*, 47 FERC 61,196 at 61,683 (1989) (Commissioner Trabandt, concurring) (emphasis supplied).

capricious and that the Commission arbitrarily and capriciously failed to require Applicants to adopt adequate ratepayer protection mechanisms.

24. Finally, NOVEC maintains that Applicants failed to carry their burden of demonstrating that wholesale customers will be adequately protected from any adverse effects on rates and that the Commission erred by imposing this burden on NOVEC.

Commission Determination

25. The issue set for hearing was whether the credit downgrade would adversely affect rates, not whether "wholesale customers will be adequately protected from any adverse rate impacts associated with the proposed transaction."[32] Applicants would have a burden of proving that ratepayers are adequately protected only if they had failed to carry their burden of proving that the transaction would not have adverse rate effects. The Commission did not shift the burden of proof on this point to NOVEC because based on the outcome of the hearing, that burden had not arisen for the Applicants. The burden of proof that shifted to NOVEC pertained to the probable effects of the credit downgrade. NOVEC's recasting of the issue from the effects of the credit downgrade to one of ratepayer protection has its roots in a misreading of statements made by the Applicants and Commission precedent.

26. NOVEC first observes that when arguing that the transaction would not adversely affect rates, the Applicants stated that "current rates will remain essentially unchanged" and then went on to say that the "*Member Cooperatives are anticipating . . . that the proposed transaction ultimately will have beneficial effects and a positive impact on their rates. . . .*"[33] NOVEC states that "[t]here is no discussion of protection against adverse rate impacts in the event that the anticipated 'beneficial effects' do not materialize."[34] But the failure of these benefits to materialize is not an adverse effect. A continuation of the status quo is not an adverse effect. NOVEC thus has simply failed to identify potential adverse effects.

27. NOVEC claims that Commission orders under FPA section 203 and the *Merger Policy Statement* support this argument. It states that "where an applicant has failed to propose any protection mechanisms or offer any explanation as to how ratepayers will be

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[32] NOVEC Rehearing Request at 2.

[33] NOVEC Rehearing Request at 23 (emphasis supplied by NOVEC).

[34] *Id.*

protected, the Commission has found the application deficient."[35] NOVEC states that the Commission explained in the *Merger Policy Statement* that "this policy 'puts the risk that the benefits will not materialize where it belongs – on the applicants.'"[36] The language in the *Merger Policy Statement* to which NOVEC refers reads in context as follows:

> Rather than requiring estimates of somewhat amorphous *net merger benefits* and addressing whether the applicant has adequately substantiated those benefits, we will focus on ratepayer protection. Merger applicants should propose ratepayer protection mechanisms to assure that customers are protected if the expected benefits do not materialize.[37]

NOVEC has quoted us out of context and overlooked the fact that the benefits in question were net benefits.[38] The failure of a benefit to materialize does not mean that a net cost will be imposed on ratepayers. It can also mean that the status quo will continue and there will be no adverse effects for customers, which is what Applicants state will happen if the potential benefits they mention do not materialize.[39]

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[35] NOVEC Rehearing Request at 22. NOVEC also cites to *Boston Edison Co.*, 117 FERC ¶ 61,083, at P 22 (2006) to support this claim. However, NOVEC misstates what the Commission said there. The paragraph that NOVEC cites to reads as follows:

> In its deficiency letter, Staff stated that Applicants have neither offered any ratepayer protection mechanism nor explained how the proposed merger will provide ratepayer protection, *since Applicants concede that the merger could increase costs to some customers*. Staff directed Applicants to either offer adequate ratepayer protection *or provide evidence to demonstrate their claim that the proposed transaction will have no adverse effect on rates*. (emphasis supplied)

The Commission thus made it clear that protection mechanisms are required to avoid a hearing only when there is a reasonable probability of adverse effects.

[36] NOVEC Rehearing Request at 23 (*citing Merger Policy Statement* at 31,024).

[37] *Merger Policy Statement* at 30,123.

[38] The Commission also emphasized the concept of net benefits in the *Merger Policy Statement* when it stated "even if certain aspects of a proposed merger are detrimental, the merger can still be consistent with the public interest if there are countervailing benefits that derive from the merger." *Id.* at 30,114.

[39] It is well settled that in demonstrating that their proposal is consistent with the public interest, applicants under FPA section 203 do not have to demonstrate that the proposal creates a public benefit. *Pacific Power & Light Co. v. FPC*, 111 F.2d 1014,

(continued)

28. These points apply equally to NOVEC's argument that the Commission arbitrarily and capriciously failed to require Applicants to adopt adequate ratepayer protection mechanisms. Such mechanisms are necessary only if an adequate showing of ratepayer harm has been made.

C. Evidentiary Issues

29. NOVEC maintains that the Commission did not properly evaluate the evidence that the credit downgrade could have a significant effect on rates and that the downgrade was a result of the proposed reorganization. NOVEC also argues that the Commission's determination that the downgrade was not significant enough to lead to higher rates lacked a reasoned explanation supported by record evidence.

30. NOVEC states that the Commission arbitrarily and capriciously found that it is unlikely that the downgrade is significant enough to lead to higher prices. The Commission failed to address substantial record evidence demonstrating that (1) any credit downgrade can have a significant effect on a company's cost of debt, (2) all else being equal, a higher cost of debt will increase rates, and (3) Applicants are likely to issue new debt under the new organizational structure. According to NOVEC, instead of addressing this evidence, the Commission concluded without reasoned explanation that the downgrade was merely a "realignment" of the ratings and that Old Dominion's rating is still relatively high. NOVEC maintains that the downgrade is likely to result in increased rates even under the Commission's "reasonable probability" standard and that the Commission's failure to address the evidence in question makes its decision arbitrary and capricious.

31. NOVEC states that the Commission erred when it found in Opinion No. 491 that because the record supports the conclusion that the credit downgrade will not raise rates, the Commission did not need to address whether the credit downgrade was due to the proposed reorganization. It argues that the fact that rating agencies viewed the reorganization negatively is significant for determining whether the reorganization is consistent with the public interest.[40] It states that the Commission erred because there is substantial record evidence that the downgrade was due to the proposed reorganization.[41] Finally, NOVEC maintains that "[e]ven if the downgrade alone is not enough to raise

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1016 (9th Cir. 1940); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 945 (1st Cir. 1993).

[40] NOVEC Rehearing Request at 27.

[41] *Id.* at 5-6, 28-29.

rates . . . , it should have alerted the Commission to the possibility of future downgrades by other agencies."[42] It says that "[t]he financial community has essentially announced" through such downgrades "that it is concerned about the Applicants' ability to manage their risk under the new organizational structure."[43]

32. NOVEC states that the Commission erred by finding that the Banc of America spread to treasuries is relevant to the question of whether the downgrade could impact rates.[44] It maintains that the Applicants' witnesses could not explain how the proxy group in the Banc of America spreads was chosen or why the group was not changed as a result of the downgrades. It states that the Applicants' own witness testified that these spreads estimate how the trading of existing debt would be affected but were a "poor proxy for future financings."[45] NOVEC thus states that there is no basis for concluding that these spreads indicate that lenders do not have a changed view of Old Dominion's investment risk as a result of the downgrade.

Commission Determination

33. We have already discussed the significance of the proposition that "all else being equal" credit downgrades will have certain effects and will not address it further here. The question of whether Applicants are likely to issue new debt under the new organizational structure loses its significance in light of the finding that the credit downgrade is not likely to affect rates adversely. Nevertheless, we note that the ALJ found that Applicants' witnesses credibly testified that Applicants have no current plans to seek new financing in the bond markets and that NOVEC's evidence merely showed that the Board has a number of possible projects under consideration.[46] NOVEC does not explain why this finding was wrong. It simply points out that the ALJ also stated that it was "inevitable" that the Applicants will issue new debt at some time and that a number of witnesses made similar statements.[47] However, even if NOVEC had shown that the credit downgrade would adversely affect rates, there would have been no reason to

[42] *Id.* at 28.

[43] *Id.* at 27-28.

[44] *See* n. 12 above for an explanation of the Banc of America spread to treasuries analysis.

[45] NOVEC Rehearing Request at 6.

[46] Initial Decision, 114 FERC ¶ 63,019 at P 32.

[47] NOVEC Rehearing Request at 15, n. 42.

presume that the rates would be adversely affected by the slight downgrade forever. As the ALJ pointed out, it is possible that by the time new financings occurred, the downgrade would have lost its impact.[48] This justifies limiting the focus to a consideration of Applicants' current plans, not what they are likely to do over an unlimited time horizon.

34. NOVEC criticizes the Commission's finding that there was no need to address whether the credit downgrade was due to the proposed reorganization, but it fails to address the reasons for that finding. We acknowledged that the downgrade was relevant to whether the reorganization was consistent with the public interest by setting the matter for hearing. However, the record developed through the hearing indicates that the downgrade is not likely to harm the public interest. NOVEC's argument that there is substantial record evidence that the downgrade was due to the proposed reorganization, even if true, does not mean that the Commission should have ruled on the point when the record as a whole shows that the downgrade will not raise rates. Finally, NOVEC's contention that the downgrade should have alerted the Commission to the possibility of future downgrades by other agencies suggests that the Commission should engage in pure speculation. Current ratings are based on the information available to the rating agencies that they deem relevant, and those ratings thus address the agencies' current concerns. The Commission will not speculate on what the rating agencies might do in the future when evaluating developments that cannot be known at this time.

35. Our conclusion that the downgrade was merely a "realignment" of Old Dominion's ratings was based on reasoned decision-making. In drawing that conclusion, we referred to record evidence (i) that the downgrade brought the S&P rating more in line with those of Moody's and Fitch and that the S&P and Fitch ratings were still one notch higher than Moody's;[49] (ii) that rating agencies do not make attempts to align their ratings, but that investors view some changes as alignments and that this was likely in this case;[50] and (iii) that investors view ratings in the aggregate and tend to focus on the middle or lowest ratings.[51] The fact that the S&P downgrade brought it in line with Fitch and the fact that the S&P and Fitch ratings were higher than that of Moody's (which would be the focus of investors) is evidence that investors would not be troubled by the S&P downgrade. This is reasoned decision-making.

[48] Initial Decision, 114 FERC ¶ 63,019 at P. 34.

[49] Ex. S-1 at 9 (Kantor).

[50] *Id.*; Ex. ODC-14 at 9-10 (Neuhedel).

[51] Ex. ODC-14 at 8-9.-

36. Finally, in response to NOVEC's contention that the Commission erred by finding that the Banc of America spread to treasuries is relevant to whether the downgrade could raise rates, we note that the issue of relevance relates to NOVEC's argument that this evidence was inadmissible hearsay.[52] Our point in Opinion No. 491 was that the hearsay rules do not apply to our proceedings and that all relevant evidence is admissible. In finding the evidence to be relevant and thus admissible, we were not making a judgment as to its probative value. In fact, we stated in Opinion No. 491 that "it does not appear that the Banc of America representative price analysis played any substantial or material role in the ALJ's decision, nor does it in our ruling."[53] Because our conclusion on this point went to the issue of admissibility, and because the evidence in question did not play a substantial or material role in our ruling, there is no need to address NOVEC's specific criticisms of the probative value of that evidence.

The Commission orders:

NOVEC's request for rehearing of Opinion No. 491 is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[52] Opinion No. 491, 117 FERC ¶ 61,313 at P 10.

[53] *Id.* at P 28.