

128 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Virginia Electric and Power Company

Docket No. ER08-1540-001

ORDER ON REHEARING

(Issued July 16, 2009)

1. The Virginia State Corporation Commission (Virginia Commission) and the Virginian State Attorney General, Division of Consumer Counsel (Virginia Consumer Counsel) seek rehearing of the December 31, 2008 order issued in this proceeding.¹ For the reasons discussed below, we deny rehearing.

Background

2. In the December 31 Order, the Commission approved a request, submitted by the Virginia Electric and Power Company, d/b/a Dominion Virginia Power (Dominion), to recover, as a Deferral Recovery Charge, regional transmission organization (RTO) start-up costs incurred from 1998 to 2004 and RTO administrative fees, as deferred since

¹ *Virginia Electric and Power Company*, 125 FERC ¶ 61,391 (2008) (December 31 Order).

2005.² Dominion also sought to recover RTO-related, projected costs and carrying charges that have, or will be, incurred by Dominion through August 31, 2009.³

3. The Commission held that the costs at issue are wholesale costs subject to the Commission's jurisdiction. The Commission also held that these costs are fundamentally related to Dominion's efforts to join and participate in an RTO, a commitment that the Commission has both encouraged and promoted. The Commission found that consistent with this policy, transmission owners are permitted to recover, through special surcharges, their costs in seeking to form and join an RTO as well as their ongoing RTO administrative fees.⁴

4. The December 31 Order also held that the costs Dominion proposed to recover were properly supported, i.e., that Dominion had sufficiently demonstrated both the nature of these costs and how they were incurred in furtherance of its RTO commitments. The Commission further held that the prudence of Dominion's costs had not been challenged. Accordingly, the Commission concluded that Dominion's costs are recoverable through Dominion's proposed surcharge.

5. The Commission rejected intervenors' argument that Dominion's costs must be denied given Dominion's asserted failure to comply with the Commission's regulatory assets accounting rules.⁵ First, the Commission noted that intervenors had not contested that these costs are related to Dominion's participation in an RTO, but rather had asserted only that the Commission could have authorized their earlier recovery, given the date of

² Dominion's RTO start-up costs were incurred in connection with its successful efforts to join PJM (*see PJM Interconnection, L.L.C. and Virginia Electric and Power Company*, 109 FERC ¶ 61,012 (2004) (Dominion Integration Order)) and its earlier, unsuccessful efforts to establish the Alliance RTO (*see Alliance Companies*, 97 FERC ¶ 61,327 (2001); *Alliance Companies*, 99 FERC ¶ 61,105 (2002) (Alliance RTO Order)).

³ In earlier orders, the Commission addressed Dominion's entitlement to record these costs as regulatory assets. *See* Dominion Integration Order, 109 FERC ¶ 61,012 at P 47, *order on reh'g*, 110 FERC ¶ 61,234 (2005) (Dominion Integration Rehearing Order) and *PJM Interconnection, L.L.C. and Virginia Electric and Power Company*, 109 FERC ¶ 61,302 (2004).

⁴ December 31 Order, 125 FERC ¶ 61,391 at P 27, citing *Idaho Power Co.*, 123 FERC ¶ 61,104, at P 10 (2008) (*Idaho Power*).

⁵ 18 C.F.R., Subchapter C, Part 101, Balance Sheet Chart of Accounts at § 182.3 (2008).

Dominion's entry into PJM. The Commission found that the rejection of Dominion's costs, on this basis, was unwarranted, given the Commission's finding that:

(i) Dominion's costs had been prudently incurred; (ii) the recovery of these costs on the amortized basis proposed by Dominion was appropriate; and (iii) Dominion reasonably believed that the recovery of its costs could be deferred, given the Commission's policy on this matter at the time that Dominion incurred its costs.

6. The Commission further found that it had not required an applicant such as Dominion to submit its rate filing to recover its RTO formation costs by any date certain following RTO start-up. The Commission pointed out that in *Idaho Power*, the Commission permitted the applicant to defer the collection of its RTO formation costs incurred from 2000 to 2008, and to recover these costs through a formula rate over a five-year amortization period.⁶ The Commission noted that it had similarly permitted other utilities to defer recovery of their RTO start-up costs beyond the date at which they had joined an RTO.⁷ The Commission concluded that it had not been shown that the delay in Dominion's cost recovery at the wholesale level had caused any harm to wholesale customers.

7. The Commission also found that, regardless of these timing considerations, accounting treatment is not controlling for ratemaking purposes.⁸ Specifically, the Commission found that the determination of whether a given cost is appropriately recoverable is made in a section 205 proceeding in which an applicant seeks recovery of the costs, not by the accounting treatment of these costs. The Commission further found that the issue was not whether Dominion could or should have chosen a different account in which to book the costs at issue, but whether these costs are properly recoverable as wholesale costs under the Federal Power Act (FPA).

8. The Commission concluded that Dominion's recovery of these costs through a surcharge is consistent with Commission policy. The Commission also concluded that the inclusion of these costs as regulatory assets was not unreasonable because, in fact,

⁶ December 31 Order, 125 FERC ¶ 61,391 at P 30, citing *Idaho Power*, 123 FERC ¶ 61,104 at P 10.

⁷ *Id.*, citing *Northeast Utils. Serv. Co.*, 121 FERC ¶ 61,308 (2007), 124 FERC ¶ 61,098 (2008); *Central Maine Power Company*, 116 FERC ¶ 61,129 (2006).

⁸ *Id.* P 31, citing *Consolidated Gas Supply Corporation*, 14 FERC ¶ 61,029 (1981); *Williston Basin Interstate Pipeline Co.*, 56 FERC ¶ 61,104 (1991); *Virginia State Corp. Comm'n v. FERC*, 468 F.3d 845, 847 (D.C. Cir. 2006).

⁹ In addition, the Commission concluded that the accumulation of these costs in a regulatory asset account was, at the time these costs were incurred, a reasonable accounting treatment.

9. Finally, the Commission found that it need not address intervenors' arguments regarding Virginia statutory law, orders issued by the Virginia Commission, and Dominion's 1998 retail rate case settlement. The Commission found that these considerations were not relevant to the issues presented by Dominion's filing, which required only a finding that Dominion's costs, as filed, are properly recoverable wholesale costs. As such, the Commission stated that it would leave for the Virginia Commission, or the State of Virginia, consistent with principles of federal preemption and the Supremacy Clause, the issue of whether, or under what circumstances, these costs are prudently incurred and recoverable in retail rates by the Dominion load serving entity.¹⁰

Requests for Rehearing

10. The Virginia Commission asserts that the Commission erred, in the December 31 Order, by failing to require Dominion to prove that the RTO-related costs Dominion seeks to defer were unrecoverable at the time these costs were incurred. The Virginia Commission notes that to recover a regulatory asset, the utility is required to demonstrate that the costs at issue were: (i) unrecoverable at the time the costs were incurred; and (ii) likely to be recoverable in the future.¹¹ The Virginia Commission further argues that the Commission, in its prior orders addressing Dominion's integration into PJM, stated that it would apply this standard at the time that Dominion made its section 205 filing to

⁹ *Id.*, citing *Central Maine Power Company*, 116 FERC ¶ 61,129 (2006).

¹⁰ *Id.* P 32, citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) (the ability to recover federal costs under a rate freeze is between "state regulators and contractual partners armed with principles of federal preemption and the Supremacy Clause"); *PG&E v. Lynch*, 216 F. Supp. 2d 1016 (N.D. Cal. 2002) (examining state recovery of federally imposed costs during a rate freeze). Moreover, the existence of a rate freeze is not necessarily determinative of recovery even if Dominion had not sought regulatory asset treatment for these costs. *Id.*

¹¹ Virginia Commission rehearing request at 3, citing 18 C.F.R. , Subchapter C, Part 101, Balance Sheet Chart of Accounts at § 182.3 (2008).

recover its RTO start-up costs, specifically including the issue of whether it could have recovered these costs in its retail and wholesale rates.¹²

11. The Virginia Commission further asserts that the Commission erred, in the December 31 Order, by failing to require the submission of evidence, by Dominion, that the deferred costs Dominion seeks to recover were not, in fact, recoverable previously. The Virginia Commission asserts that the Commission relied only on the subjective belief of Dominion that its RTO-start up costs was previously unrecoverable. The Virginia Commission argues that, in fact, evidence was presented by the Virginia Commission and by other parties demonstrating the recoverability of Dominion's RTO-related costs at the time these costs were incurred, including evidence regarding Virginia statutory law, orders issued by the Virginia Commission, and Dominion's 1998 retail rate case settlement. The Virginia Commission also cites as error the Commission's reliance on *Idaho Power*. The Virginia Commission notes that in that case, deferred recovery of RTO start-up costs was permitted based solely on the undisputed prior unrecoverability of these costs due to *wholesale* rate considerations – because the proposed RTO at issue in that case had not been established. The Virginia Commission argues that, by contrast, deferred recovery in this case was premised on the asserted *retail* rate restrictions embodied in state law. The Virginia Commission argues that deferred recovery may not be premised on these state law assertions for the reasons noted above.

12. The Virginia Commission also alleges that the Commission erred, in the December 31 Order, in not considering the effect of unbundling retail rates and in failing to consider the Commission's jurisdiction over unbundled retail transmission costs. The Virginia Commission argues that Dominion itself, in pleadings submitted before the Virginia Commission, has represented that the Commission has exclusive jurisdiction over both wholesale and retail transmission rates. The Virginia Commission asserts that, if so, Dominion should not have been permitted to suggest in this proceeding that the wholesale costs it seeks to recover were previously unrecoverable by operation of retail rate restrictions.

13. The Virginia Consumer Counsel argues that the Commission erred, in the December 31 Order, by permitting Dominion to double-recover its RTO-related costs. The Virginia Consumer Counsel asserts that this double recovery occurs where, as here, Dominion could have recovered its costs previously and is being permitted to do so now. The Virginia Consumer Counsel also argues that the Commission erred, in the December 31 Order, by ignoring appropriate RTO revenue offsets, including the

¹² *Id.* at 4, citing *Dominion Integration Rehearing Order*, 110 FERC ¶ 61,234 at P 41.

\$103 million in Financial Transmission Rights revenues earned by Dominion from May 2005 through May 2007. The Virginia Consumer Counsel argues that, as a result, Dominion's revenue requirement has been artificially inflated.

14. The Virginia Consumer Counsel also argues that the Commission erred, in the December 31 Order, by authorizing the recovery of costs that could have been recovered previously and thus engaging in unlawful retroactive ratemaking. The Virginia Consumer Counsel also argues that the Commission erred, in the December 31 Order, by approving carrying charges created and accumulated only because Dominion delayed seeking recovery of its RTO start-up costs. The Virginia Consumer Counsel also argues that the Commission erred, in the December 31 Order, by failing to apply the relevant accounting standard.¹³ The Virginia Consumer Counsel also argues that the Commission erred, in the December 31 Order, by declining to resolve the issue of regulatory asset accounting treatment, consistent with the Commission's representations to the U.S. Court of Appeals for the D.C. Circuit in a related appeal.¹⁴

15. The Virginia Consumer Counsel argues that the Commission erred, in the December 31 Order, by declining to resolve the issue of regulatory asset accounting treatment and thus failing to apply the burden of proof requirement under the Federal Power Act.

16. Finally, the Virginia Consumer Counsel requests clarification regarding the Commission's statement, in the December 31 Order, that "[w]e determine here only that Dominion's costs, as filed, are properly recoverable wholesale costs [,] [thus leaving] for the Virginia Commission, or the State of Virginia, the issue of whether, or under what circumstances, these costs may be recovered in retail rates by the Dominion load serving entity."¹⁵ The Virginia Consumer Counsel seeks clarification regarding the options available to the Virginia Commission regarding either the rejection or pass through of Dominion's costs to Dominion's retail customers, pursuant to the filed-rate doctrine.

¹³ The Virginia Commission makes the same argument. *See supra* P 10.

¹⁴ Virginia Consumer Counsel rehearing request at 15-17, *citing* "FERC Motion to Dismiss," *Virginia SCC v. FERC*, Docket Nos. 05-1147 and -1149 (D.C. Cir filed July 25, 2005).

¹⁵ December 31 Order, 125 FERC ¶ 61,391 at P 32.

Discussion

A. Procedural Matters

17. On February 13, 2009, Dominion filed an answer responding to the rehearing requests submitted by the Virginia Commission and the Virginia Consumer Counsel. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), prohibits an answer to a request for rehearing. Accordingly, we reject Dominion's answer.

18. The Virginia Commission submitted its rehearing request in the form of an electronic filing. However, this filing fails to comply with the Commission's requirements regarding text-searchable formats.¹⁶ We have accepted the Virginia Commission's electronic filing. However, we remind all parties submitting such filings in the future to comply with the Commission's regulations which are designed to ensure that electronic filings are user-friendly for both the Commission, Commission staff, and other parties to a proceeding.¹⁷

B. Analysis

19. We deny rehearing of the December 31 Order. The Commission's long-standing policy is to encourage and promote RTO formation and, consistent with this policy, to permit utilities to recover their prudently-incurred RTO formation costs. In fact, at the time Dominion incurred its start-up costs relating to the Alliance RTO, the Commission expressly required that recovery of these costs be deferred until such time as Dominion joined an RTO.¹⁸ These start-up costs are considered by the Commission to be an investment in a more efficient method of buying and selling electricity with benefits that accrue to wholesale ratepayers into the future. Because this investment has future benefits to the wholesale ratepayers who participate in the RTO, we amortize this investment over a number of years (over a 10-year period in the case of Dominion).

20. Petitioners' rehearing arguments suggest a fundamental misunderstanding of the meaning and function of regulatory assets under our accounting regulations and the

¹⁶ See *Filing Via the Internet*, Order No. 703, FERC Stats. & Regs. ¶ 31,259, at P 8, 23-24, 26, (2007); see also <http://www.ferc.gov/docs-filing/efiling.asp>.

¹⁷ *Id.* (“[Non-scanned electronic filings provide] access to tools that permit faster searches, increased accuracy, and enhanced analytical and processing capabilities[.]”).

¹⁸ December 31 Order, 125 FERC ¶ 61,391 at P 27.

relationship between these regulatory assets and our ratemaking rules. Regulatory assets are defined in our regulations as “specific revenues, expenses, gains, or losses that would have been included in net income determination in one period under the general requirements of the Uniform System of Accounts but for it being probable: A. that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services.”¹⁹

21. Under the Uniform System of Accounts some costs are to be charged to income (expense accounts) as soon as they are incurred. Other costs are initially recorded as assets and depreciated (e.g., utility plant investment) or amortized (e.g., regulatory assets) to income over future periods, usually in recognition that such costs benefit future periods. Although from a ratemaking perspective, a specific cost included in income is not generally recoverable in rates *per se*, such an expense may be included as part of the base and test period in a rate case for the purpose of projecting representative levels of costs that would be incurred during the periods the rates are in effect.²⁰ For non-recurring costs that are initially recorded as assets, the Commission frequently permits rate recovery through amortization of the specific costs involved. In the Dominion Integration Order, the Commission explained that it permits the recovery of RTO start-up costs because such costs are designed to produce efficiency benefits to future rate payers:

[T]he initial development and determination of how the businesses will operate usually requires considerable costs that must be incurred before actual business operations commence. Similarly, before receiving the commercial benefits of being integrated with an RTO, start-up costs must be incurred by the RTO-member applicants (in this case Dominion). We have explained that when such costs are incurred in periods apart from the anticipated benefit period, the costs should be allocated to the periods when the related benefits are expected to be realized. To accomplish this objective, the costs must be recorded initially as an asset, deferred, and then amortized to expense over the anticipated benefit period.²¹

¹⁹ 18 C.F.R. Part 101 (2008).

²⁰ For example, a labor expense in a past period is not directly recoverable in rates. Instead, a representative amount of such an expense is included as an expense in determining the utility’s rates.

²¹ Dominion Integration Order, 109 FERC ¶ 61,012, at P 50.

22. Regulatory asset costs could therefore include non-recurring costs that a utility determines are probable of recovery in periods other than the period in which they are incurred. The Commission's regulations contain no requirement as to when a utility must begin to amortize these costs. Under our regulations, rather, it is up to the utility in the first instance to determine whether a particular cost or set of costs is likely to be recoverable in future rates and therefore should be accounted for as a regulatory asset.²² If the utility does determine that the cost is not included in existing rates and it is probable that such cost will be included in future rates it can book the cost as a regulatory asset. When the Commission reviews the utility's next rate case filing, the Commission determines whether those costs are appropriately recovered in current rates. The treatment of a cost at the wholesale level as a regulatory asset is unrelated to whether a state regulator will or will not permit recovery of a rate that includes such costs in a wholesale customer's retail rates.

23. Here, Dominion chose to treat certain expenses of joining an RTO as a regulatory asset because it believed that Commission policy permitted recovery of such costs in wholesale rates in later periods. When Dominion filed its rate case to recover this investment, the Commission reviewed its filing, examined its precedent, and agreed with Dominion that, under Order No. 2000, the costs of joining an RTO are considered investments in providing for more efficient service to customers in periods after the costs are incurred. As the Commission made clear in the December 31 Order: "[b]ecause efforts to create RTOs are in furtherance of the Commission's policies, we permit transmission owners to recover through special surcharges their costs in seeking to form and join an RTO as well as their ongoing administrative fee costs related to their participation in the RTO."²³

²² See *TransColorado Gas Transmission Company*, 69 FERC ¶ 61,066 (1994):

Regulatory assets arise from specific expenses or losses that would have been included in net income determinations in one period under the general requirements of the U.S. but for its being probable that such items will be included in a different period(s) for purposes of developing the rates a utility is authorized to charge for its utility services. The term "probable" as used in the definition of regulatory assets refers to that which is reasonably expected or believed, but which is neither certain nor proved.

Id. at 61,288.

²³ December 31 Order, 125 FERC ¶ 61,391 at P 27.

24. By finding that amortization of these costs is appropriate, the Commission agreed with Dominion's determination that such costs were an investment in a more efficient transmission system with ongoing benefits to customers. Accordingly, the Commission agreed that for rate purposes, these costs should be treated as regulatory assets recoverable through amortization.

25. On rehearing, petitioners generally claim that a cost can be included as a regulatory asset only when a regulatory barrier exists that prevents the costs from being recoverable in current rates. In support of that position, petitioners cite to prior Commission orders stating that for a cost to be included as a regulatory asset "the costs at issue [must be] unrecoverable in existing rates."²⁴ However, these arguments misinterpret the Commission's policy. In fact, the aforementioned quoted statement does not specify, or otherwise discuss, whether the utility is prohibited by regulation from recovering costs (either at wholesale or retail) starting at any particular date, as the rehearing requests claim. Rather, the Commission's prior statement was merely another way of expressing the proposition discussed above that a cost incurred to benefit future periods that has not been included in determining the utility's currently effective rates, i.e., is not recoverable in current rates, should be amortized over the period in which the benefits are realized.

26. Moreover, the rehearing requests maintain that even if recovery is permitted, such recovery must begin on the date on which the utility joins the RTO and, if the utility fails to file immediately to begin recovery, recovery is barred. While some prior findings made by the Commission may have lent support to this view,²⁵ this is not a requirement established under the Commission's regulations and, as the December 31 Order found, the Commission in other cases has not insisted on such a requirement.²⁶ As the December 31 Order further found, permitting recovery to begin within a few years of Dominion joining the RTO appropriately matches costs with benefits and does not cause harm to wholesale customers.²⁷

²⁴ Dominion Integration Order, 109 FERC ¶ 61,012 at P 53.

²⁵ See, e.g., *id.* P 52.

²⁶ In a number of cases, the Commission has found that the amortization period need not start immediately upon the company's entry into an RTO. December 31 Order, 125 FERC ¶ 61,391 at P 30; accord *Northeast Utils. Serv. Co.*, 121 FERC ¶ 61,308 (2007); *Central Maine Power Company*, 116 FERC ¶ 61,129 (2006).

²⁷ Even if recovery did not begin immediately, such a deferral would not bar Dominion from recovering all of its costs, as the rehearing petitions suggest. Depending

(continued...)

1. Virginia Commission's Rehearing Requests

27. We reject the Virginia Commission's argument that the Commission, in the December 31 Order, failed to apply the Commission's cost deferral accounting rules by neglecting to consider whether Dominion's RTO-related costs were unrecoverable when incurred. We expressly found, in the December 31 Order, that Dominion's costs are wholesale costs subject to our jurisdiction. Accordingly, for wholesale ratemaking purposes, it was sufficient to find that Dominion's costs were prudently incurred,²⁸ attributable to Dominion's commitment to join an RTO (the policy warranting deferred cost treatment),²⁹ and appropriately allocated to the ratepayers responsible for these costs under the amortization schedule Dominion proposed in its filing.³⁰

28. The Virginia Commission insists that Dominion's costs must be shown to be unrecoverable in wholesale and retail rates at the time they were incurred. But, as discussed above, this argument misinterprets the underlying purpose and function of regulatory asset treatment. The issue, here, is not whether a wholesale or retail regulatory prohibition prevents Dominion from recovering its RTO start-up costs; the issue, rather, is whether the benefits of these costs accrue to a later accounting period.

29. The Virginia Commission suggests that even assuming Dominion was entitled to recover its RTO start-up costs in its wholesale rates, the filing to recover these costs should have been made earlier, when Dominion joined PJM. The Virginia Commission further suggests that on these grounds, the instant filing fails to satisfy the first prong of the Commission's cost deferral accounting rules. However, the Virginia Commission fails to cite any precedent supporting this proposition. The Virginia Commission also fails to show that the delay in cost recovery, at the wholesale level, has caused, or will cause, undue harm to wholesale rate payers. By contrast, the Commission, in the

on the amortization period chosen, it would only lead to an inability to recover for the period between the joining of the RTO and the section 205 filing to begin recovery. We have found no reason to penalize the utility by precluding recovery of certain costs just because the utility did not file immediately to begin recovery. Moreover, such a rule could lead utilities to lengthen amortization periods to reduce the amount of uncollected costs.

²⁸ December 31 Order, 125 FERC ¶ 61,391 at P 28.

²⁹ *Id.*

³⁰ *Id.* P 30. For this reason, we also reject the Virginia Consumer Counsel request for rehearing on this same issue.

December 31 Order, cited to a number of cases permitting recovery of RTO formation costs after a utility joins an RTO.³¹ As the December 31 Order further notes, Dominion began to incur its RTO start-up costs in 1998, well before the establishment of the PJM RTO in 2005. Moreover, these costs were deferred based on an established Commission policy permitting deferral of such costs. In addition, the remainder of the costs is directly related to Dominion's wholesale RTO commitments. Under these circumstances, the Commission has not required that such costs be recovered within any specific time period after the utility joins an RTO.

30. The Virginia Commission also argues that dicta in the Dominion Integration Rehearing Order, regarding the Commission's intended, future review of retail rate recovery considerations in this proceeding, required Dominion to show that its costs would be unrecoverable in its retail rates and further committed the Commission to consider this issue in the December 31 Order. As we explained in the December 31 Order, we have determined that this was not an accurate statement of the requirements for regulatory asset treatment; rather, cost recovery at the wholesale level should not depend on cost recovery at the retail level. For example, in another Midwest ISO proceeding, we found that wholesale costs can appropriately be passed through to transmission owners regardless of whether the transmission owners can pass those costs on to consumers in retail rates.³² As the Court of Appeals for the District of Columbia Circuit concluded under similar circumstances: “[Where the Commission's rate recovery authorizations] result[] in ‘trapped’ costs, [the aggrieved transmission owners'] initial recourse is to their

³¹ *Idaho Power*, 123 FERC ¶ 61,104; *Northeast Utils. Serv. Co.*, 121 FERC ¶ 61,308 (2007) (permitting deferred recovery of RTO costs subject only to an analysis of whether delay in recovery would result in rate impact to wholesale customers), 124 FERC ¶ 61,098 (2008) (accepting compliance filing showing no rate impact from delay); *Central Maine Power Company*, 116 FERC ¶ 61,129 (2006) (accepting Central Maine's proposal for rate recovery of deferred RTO formation costs).

³² Even assuming that deferred cost recovery, in this case, required a showing that Virginia state law barred Dominion from recovering its RTO-related costs at the time Dominion's costs were incurred, the record here contains sufficient evidence supporting this finding. As the State of Virginia noted in its protest: “[s]ince 2002, Dominion's Virginia retail rates have been capped, subject to express exceptions mostly irrelevant to this case.” Commonwealth of Virginia protest at 5; *see also* Virginia Commission protest at 15 (arguing that the Commission should “preclude Dominion from recovering any costs that [Dominion], ‘by agreeing to a rate freeze or contractually waiving its unilateral right to seek a rate increase, assume[d] the risk’ of recovering.”).

state regulators and contractual partners armed with principles of federal preemption and the Supremacy Clause -- not to FERC.”³³

31. Similarly, in this case, we find that the question of wholesale recovery of costs should not depend on our determination of whether these costs are recoverable in retail rates. As we stated in the December 31 Order, our ruling here finds only that the costs sought to be recovered here are legitimate one-time wholesale costs that can be recovered and does not address whether such costs can be recovered in retail rates:

We emphasize that our findings, above, make no determination as to the effect of a retail rate freeze on recovery of the previously-incurred wholesale costs. We determine here only that Dominion's costs, as filed, are properly recoverable wholesale costs. We leave for the Virginia Commission, or the State of Virginia, the issue of whether, or under what circumstances, these costs may be recovered in retail rates by the Dominion load serving entity.³⁴

32. The Virginia Commission further argues that the December 31 Order erred, because “for years, Dominion has told the [Virginia Commission] in no uncertain terms that the Commission, not the [Virginia Commission], has exclusive jurisdiction over both wholesale and retail transmission rates, that the [Dominion Integration Order] had a preemptive effect over state law, and that any attempts by the [Virginia Commission] to apply state law otherwise would ‘conflict with and circumvent [the Commission’s] exclusive jurisdiction over the treatment of RTO-related costs such as start-up costs and PJM administrative fees, which [the Commission] has now resolved.”³⁵ However, as we explained in the December 31 Order, our determination with respect to recovery of the RTO costs is related solely to recovery of the costs in Dominion’s wholesale rates. Our determination to permit wholesale recovery continues to leave the Virginia Commission

³³ *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004). We express no view on whether, if the State of Virginia seeks to bar recovery of the costs at issue here, federal preemption or the Supremacy Clause will nevertheless mandate recovery.

³⁴ December 31 Order, 125 FERC ¶ 61,391 at P 32.

³⁵ Virginia Commission rehearing request at 7.

with the ability to determine, and if necessary litigate in a court of competent jurisdiction, whether the Virginia rate freeze prevents the pass through of these costs in retail rates.³⁶

33. We reject the Virginia Commission's related arguments that the Commission misinterpreted the application of *Idaho Power*, and relied only on the self-serving subjective intent of Dominion. The Virginia Commission asserts that *Idaho Power* is distinguishable from the instant case because the Commission, in *Idaho Power*, authorized the deferred recovery of RTO start-up costs based solely on wholesale rate considerations, i.e., because the proposed RTO in that case had not been established at the time that the costs at issue had been incurred. The Virginia Commission argues that here, by contrast, Dominion's filing was motivated by retail rate considerations. However, the Commission's authority in this case arises under the FPA. As such, the Commission was authorized, and indeed required, to base its ruling on wholesale rate consideration (and in doing so applying *Idaho Power*, a case addressing the recovery of wholesale RTO start-up costs). As discussed above, the State of Virginia retains its authority to argue that its retail rate freeze prevents the pass through of these costs in retail rates.

34. The Virginia Commission argues next that in accepting Dominion's proposed recovery of its RTO-related costs, the Commission erred in relying on the subjective determination of the utility that the deferred costs at issue would be recoverable in a future section 205 filing (thus satisfying the second prong of the Commission's cost deferral accounting rules). The Virginia Commission asserts that a failure to satisfy this accounting rule, in this instance, warrants a rejection of the underlying costs at issue. However, as the Commission found in the December 31 Order, accounting practices are not, and should not be, controlling for ratemaking purposes.³⁷ In fact, the determination of whether regulatory asset treatment is appropriate at the time this accounting convention is employed is a determination that can be made by the utility's accountants and auditors, without prior Commission approval.³⁸ When Dominion filed to recover these costs, the Commission determined consistent with its precedent that amortization of

³⁶ Even if Dominion had not sought deferral of wholesale rate recovery, Dominion's ability to recover these costs in retail rates would still be an issue. *See PG&E v. Lynch*, 216 F. Supp. 2d 1016 (N.D. Cal. 2002) (examining whether a state rate freeze may prevent recovery of wholesale costs incurred during the freeze).

³⁷ December 31 Order, 125 FERC ¶ 61,391 at P 31, n.33.

³⁸ Dominion Integration Rehearing Order, 110 FERC ¶ 61,234 at P 40.

these start-up costs to future periods was appropriate and consistent with the Commission's treatment of RTO start-up costs.

2. Virginia Consumer Counsel's Rehearing Requests

a. Whether the December 31 Order Erred by Permitting Dominion to Double Recover Its Costs

35. The Virginia Consumer Counsel argues that the December 31 Order impermissibly allows for the double-recovery of RTO costs by permitting Dominion to recover its RTO-related costs during both Virginia's capped retail rate period (a right which it voluntarily relinquished) and during the period following the expiration of these rate caps.

36. The Virginia Consumer Counsel provides no evidence that Dominion will recover these costs twice. The costs have been accumulated in the regulatory asset account and will be recovered at wholesale through the rates accepted in this order on an amortized basis. Although not entirely clear, the Virginia Consumer Counsel seems to suggest that our determination here will, due to the retail rate freeze, permit a double recovery at the retail level. But, as discussed above, we do not regulate retail rates, and the issue of whether these costs are recoverable at retail is left to the state regulator to determine.

b. Whether the December 31 Order Erred by Ignoring Appropriate RTO Revenue Offsets

37. We reject the Virginia Consumer Counsel's argument that in authorizing Dominion to recover its RTO-related costs, the December 31 Order failed to consider appropriate transmission-related revenue offsets, specifically, the \$103 million in Financial Transmission Rights revenues earned by Dominion from May 2005 through May 2007. Dominion, in its October 31, 2008 answer to intervenors' protests, provides a detailed, point-by-point rebuttal to this renewed argument, asserting among other things, that this asserted potential offset: (i) misconstrues the role and purpose of Financial Transmission Rights; (ii) overlooks the fact that Financial Transmission Rights do not constitute a guaranteed positive revenue distribution to Dominion; (iii) focuses on only one such potential offset, representing approximately 1 percent of Dominion's total deferred PJM administrative charges; and (iv) involves revenues that have been functionalized as generation-related revenues.

38. In Order No. 2000, the Commission held that appropriate RTOs could successfully address the existing impediments to efficient and competitive grid operation and that

substantial costs savings were likely to result from the formation of RTOs.³⁹ Accordingly, the Commission held that the reasonable costs of developing an RTO may be included in transmission rates.⁴⁰ Our policy has been to permit the recovery of these start-up costs as a surcharge through a limited section 205 filing, without consideration of potential offsets, in order to ensure that utilities have the incentive to join and participate in an RTO. Had we required a full section 205 rate case every time utilities sought to join an RTO, the utility's incentive to join could be significantly muted, thereby defeating the purpose of allowing recovery of such costs.

39. Moreover, as the Virginia Consumer Counsel notes, Dominion has established a formula rate in which all costs and revenues are updated every year. Thus, the formula rate will now include these RTO related expenses and will also reflect all appropriate revenues generated from FTRs and other sources.

c. **Whether the December 31 Order Erred by Engaging in Unlawful Retroactive Ratemaking**

40. The Virginia Consumer Counsel argues that the Commission, in accepting Dominion's rate filing, engaged in unlawful retroactive ratemaking because, it claims, the Commission allowed for the recovery of prior period costs.

41. The rule against retroactive ratemaking prevents a utility from recovering in current rates costs incurred in providing service in prior periods.⁴¹ But, as we explained earlier, the RTO start-up costs for which we are permitting recovery are not costs incurred in providing a past service.⁴² In contrast, these are costs incurred in order to

³⁹ Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 30,993 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd. sub nom., Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

⁴⁰ *Id.* at 31,196.

⁴¹ *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).

⁴² Indeed, one of the reasons the Commission required Dominion to defer the collection of costs relating to the formation of the Alliance RTO is that the benefits of these costs would not be realized until Dominion did join an RTO. *Alliance RTO Order*, 99 FERC ¶ 61,105, at 61,442 ("We recognize that Alliance GridCo participants may have incurred start-up costs to develop systems that will not be used by the Midwest ISO to provide service to Alliance GridCo or other Midwest ISO entities or by Alliance GridCo to provide service to customers in its footprint. Therefore, we clarify that we intend to

(continued...)

improve the efficiency of service through joining an RTO. The start-up investments therefore are properly allocated to the current and future wholesale customers of Dominion.⁴³

42. Moreover, Order No. 2000 put all parties on notice that RTO start-up costs would be recoverable in transmission rates, and the *Alliance RTO Order*,⁴⁴ and Dominion's May 11, 2004 filing, provided notice that these costs would be deferred for later recovery. Retroactive ratemaking does not apply when the customers are on notice that rates may be increased.⁴⁵ The Virginia Consumer Counsel also could have sought rehearing of these orders and it cannot now raise objections to the propriety of these determinations.

d. **Whether the December 31 Order Erred by Permitting Dominion to Recover Its Proposed Carrying Charges**

43. We reject the Virginia Consumer Counsel's argument that the December 31 Order erred in permitting Dominion to collect carrying charges. The Virginia Consumer Counsel asserts that these carrying charges were incurred by Dominion due to Dominion's unjustified delay in recovering its RTO-related costs. However, the Virginia Consumer Counsel fails to provide sufficient justification for requiring Dominion to waive carrying charges on this basis. Carrying charges reflect the time value of money, i.e., the interest on the deferred costs from the time of incurrence until the time at which those funds are recovered. Recovery of these charges is necessary to ensure that Dominion receives compensation for the costs that it has incurred and the time value of not recovering these costs earlier.⁴⁶ As we have pointed out previously, the Commission

allow recovery of all costs prudently incurred by any Alliance GridCo participant to establish an RTO once it is a member of an RTO").

⁴³ See *Public System v. FERC*, 709 F.2d 73, 85 (D.C. Cir. 1983) (retroactive ratemaking not implicated when the Commission attributes costs to those that benefit from the cost incurrence).

⁴⁴ 99 FERC ¶ 61,105, at 61,442 (2002).

⁴⁵ *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990).

⁴⁶ See *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999) (noting that compensation deferred is compensation reduced by the time value of money and that interest is simply a way of ensuring full compensation); *Southeastern Mich. Gas Co. v. FERC*, 133 F.3d 34, 44 (D.C. Cir. 1998) (reversing the Commission's decision to

(continued...)

has not established a date-certain deadline applicable to RTO start-up cost recovery filings. Moreover, the Commission has permitted utilities to recover carrying charges when their filings to recover these costs were made following their initial membership in their respective RTOs.⁴⁷ Dominion's RTO costs will be recovered during the period in which consumers are receiving the benefits of Dominion's joining PJM. Moreover, most of the \$38 million in carrying charges to which the Virginia Consumer Counsel objects results from the Commission's own requirement that Dominion defer the start-up costs of forming the Alliance RTO.

44. The Virginia Consumer Counsel also argues that carrying charges should be denied because nothing prevented Dominion from filing to recover these costs when they were incurred. As stated previously, the Commission itself did not permit the recovery of the Alliance RTO start-up costs when they were incurred, but required the deferral of these costs for later recovery.

45. Nor do we find that consumers have been harmed by the recovery of carrying charges, as the Virginia Consumer Counsel alleges. The carrying charges on the regulatory assets reasonably approximate the benefit enjoyed by Dominion's customers as a result of not having to pay such costs earlier.⁴⁸ In other words, the carrying charges added to the deferred regulatory assets approximate the benefit Dominion's customers have received as a result of the deferral.

grant refunds and surcharges while denying interest payments attributable to those refunds and surcharges).

⁴⁷ See *Central Maine Power Company*, 116 FERC ¶ 61,129 (2006) (granting carrying charges for one year after the start-up of ISO New England, Inc.); *Idaho Power Co.*, 123 FERC ¶ 61,104 (2008) (granting carrying charges for two years after the dissolution of the proposed Grid West RTO); *Northeast Utils. Serv. Co.*, 124 FERC ¶ 61,098 (2008) (granting carrying charges for a two-year period while accepting the company's voluntary proposal to waive carrying charges for an additional two year period).

⁴⁸ The carrying charges are determined using the return accepted by the Commission as just and reasonable in Dominion's rate case. While contending in general that this return is unfair to consumers, the Virginia Consumer Counsel did not explain why the investment in RTO costs should be treated differently than any other investment by Dominion.

e. **Whether the December 31 Order Erred by Failing to Follow the Position Outlined by the Commission Before the D.C. Circuit Court of Appeals**

46. We reject the Virginia Consumer Counsel's argument that the Commission erred, in the December 31 Order, by failing to undertake the examination of the accounting issue it discussed in a pleading in an appeal of an earlier order in this proceeding before the U.S. Court of Appeals for the D.C. Circuit. The Virginia Consumer Counsel cites to the following statement in the Commission's brief:

In sum, the structure of the statute and regulations all point to the substantive issue of the proper accounting and rate treatment being resolved at such time as Dominion makes an FPA § 205 rate filing, with Dominion having the burden of proof to show that these costs meet the prerequisites for treatment as regulatory assets.^[49]

47. The December 31 Order examined Dominion's filing and found its recovery request appropriate. The December 31 Order also explained why these costs were properly booked as regulatory assets, i.e., because Dominion had a reasonable expectation that its RTO investments could be recovered in future periods.

f. **Whether the December 31 Order Erred by Failing to Apply the Commission's Burden of Proof Requirements**

48. We reject the Virginia Consumer Counsel's argument that the Commission erred, in the December 31 Order, by failing to follow the Commission's burden of proof requirements under the FPA. For the reasons stated above, Dominion's proposed rates in this case were appropriately accepted by the Commission based on a showing that the underlying costs were prudently-incurred, attributable to Dominion's commitment to join an RTO, and appropriately allocated to the ratepayers responsible for these costs.

49. The Virginia Consumer Counsel maintains that Dominion failed to satisfy its burden of providing evidence of its "capped rate earnings." This apparently refers to the argument addressed earlier that Dominion was required to show that it would be unable to recover these costs in its retail rates. As we have explained, the issue of rate recovery at retail is not germane to our consideration of whether wholesale recovery is appropriate.

⁴⁹ Virginia Consumer Counsel rehearing request at 17.

g. **Whether the Commission Should Clarify the Rights of the Virginia Commission to Either Reject or Pass Through Dominion's RTO-Related Costs in Dominion's Retail Rates**

50. We deny the Virginia Consumer Counsel's request for clarification regarding the options available to the Virginia Commission regarding either the rejection or pass through of Dominion's costs to Dominion's retail customers. For the reasons explained above, retail rate issues are beyond our statutory authority, and we will neither anticipate nor decide here retail rate issues arising under state law.

The Commission orders:

The Virginia Commission's and Virginia Consumer Counsel's requests for rehearing of the December 31 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.