ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-1147, *et al.*

VIRGINIA STATE CORPORATION COMMISSION, *et al.*
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 9, 2006
FINAL BRIEF MAY 12, 2006

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties, intervenors, and amici appearing below and in this Court are listed in petitioners' briefs.

B. Rulings Under Review

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *PJM Interconnection, L.L.C.,* 109 FERC ¶ 61,012 (2004)

2 *PJM Interconnection, L.L.C.,* 110 FERC ¶ 61,234 (2005)

C. Related Cases

Counsel is not aware of any related cases.

Samuel Soopper
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May 12, 2006

TABLE OF CONTENTS

PAGES

STATEMENT OF THE ISSUES……………………………………….................1

STATUTORY AND REGULATORY PROVISIONS………………………….....2

COUNTER STATEMENT OF JURISDICTION…………………………………2

STATEMENT OF THE CASE……………………………………………………2

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW……………………………………………………2

II. STATEMENT OF THE FACTS……………………………………………4

A. Statutory and Regulatory Background……………………………….4

B Development of Dominion's Proposal……………………………….6

C. The Orders on Review………………………………………………..7

1. The Initial Order……………………………………………………7

2. The Rehearing Order………………………………………………10

SUMMARY OF ARGUMENT…………………………………………………...12

ARGUMENT…………………………………………………………………….....14

I. THE PETITIONS FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION, AS PETITIONERS HAVE NOT ALLEGED AN INJURY THAT CAN BE REDRESSED BY THE COURT DERIVING FROM THE COMMISSION'S ACCOUNTING GUIDANCE………………………………………………………………..14

TABLE OF CONTENTS

PAGES

II. THE COMMISSION'S DETERMINATION TO DEFER RULING ON THE RECOVERABILITY OF DOMINION'S COSTS UNTIL ITS RATE CASE WAS A REASONABLE EXERCISE OF THE AGENCY'S PROCEDURAL DISCRETION…………………….....22

A. Standard of Review……………………………………………………..22

B. The Commission Reasonably Exercised Its Discretion at This Juncture by Declining to Decide Whether Regulatory Asset Accounting Was Appropriate for the Costs at Issue………………....22

C. Petitioners Cannot Establish that the Commission Abused Its Procedural Discretion by Declining to Reach the Merits.………...27

CONCLUSION………………………………………………………….……….....31

TABLE OF AUTHORITIES

PAGES

COURT CASES:

* *Alabama Municipal Distributors Group v. FERC,*
312 F.3d 470 (D.C. Cir. 2002)……………………….................14,15,20,21

Alabama Power Co. v. FERC,
993 F.2d 1557 (D.C. Cir. 1993)……………………………………….....19

Algonquin Gas Transmission Co. v. FERC,
948 F.2d 1305 (D.C. Cir. 1991)……………………………………...25,27

Association of Businesses Advocating Tariff v. Hanzlik,
779 F.2d 607 (D.C. Cir. 1985)………………………………………….27

Atlantic City Electric Co. v. FERC,
295 F.3d 1 (D.C. Cir. 2002)………………………………………………7

AT&T Corp. v. FCC,
317 F.3d 337 (D.C. Cir. 2000)…………………………………………..31

CNG Transmission Corp. v. FERC,
40 F.3d 1289 (D.C. Cir. 1994)…………………………………………17

Consolidated Edison Co. v. FERC,
315 F.3d 316 (D.C. Cir. 2003)…………………………………………..22

Consumers Energy Co. v. FERC,
425 F.3d 1065 (D.C. Cir. 2005)………………………………………..7

Grand Council of Cress (of Quebec) v. FERC,
198 F.3d 950 (D.C. Cir. 2000)…………………………………………20

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGES

COURT CASES: (con't)

GTE Service Corp. v. FERC,
782 F.2d 263 (D.C. Cir. 1986)……….……………………………….25

Louisiana Energy and Power Authority v. FERC,
141 F.3d 364 (D.C. Cir. 1998)……………………….………………14

* *Lujan v. Defenders of Wildlife,*
504 U.S. 555 (1992)……………………………………………………..15

Midwest ISO Transmission Owners v. FERC,
373 F.3d 1361 (D.C. Cir. 2004)……………………………………..6

Mobil Oil Exploration v. United States,
498 U.S. 211 (1991)……………………………………………………..25

New York State Electric & Gas Corp. v. FERC,
177 F.3d 1037 (D.C. Cir. 1999)………………………………………14

Public Utility Dist. No. 1 of Snohomish Count v. FERC,
272 F.3d 607 (D.C. Cir. 2001)……………………………………...6,14

Rainbow/PUSH Coalition v. FCC,
330 F.3d 539 (D.C. Cir. 2003)…………………………………......15

Sierra Club v. EPA,
292 F.3d 895 (D.C. Cir. 2002)…………………………………......15

Tennessee Valley Municipal Gas Assn. v. FERC,
140 F.3d 1085 (D.C. Cir. 1998)………………………………………25

United States Telecom. Ass'n v. FCC,
359 F.3d 554 (D.C. Cir. 2004)….…….……………………………27

Village of Bensenville v. FAA,
376 F.3d 1114 (D.C. Cir. 2004)………………………………………15

TABLE OF AUTHORITIES

PAGES

ADMINISTRATIVE CASES:

Algonquin Gas Transmission Co.,
107 FERC ¶ 61,250 (2004)…………………………………………....29

Alliance Companies, et al.,
97 FERC ¶ 61,327 (2001)…………………………………………………3

Consolidated Edison Co. of N.Y.,
86 FERC ¶ 61,064 (1999)……………………………………………..29

Consolidated Gas Supply Corp.,
14 FERC ¶ 61,029 (1981)…………………………………………………5

Equitrans, LP,
106 FERC ¶ 61,340 (2004)…………………..……………………...6,29

Midwest Independent Transmission System Operator, Inc.,
102 FERC ¶ 61,279 (2003)…..…………………………………………..11

Midwest Independent Transmission System Operator, Inc.,
103 FERC ¶ 61,205 (2003)…..……………………………………6,9,11

Midwest Independent Transmission System Operator, Inc.,
106 FERC ¶ 61,337 (2004)…..…………………………………………..11

PJM Interconnection, LLC,
109 FERC ¶ 61,012 (2004).………………………………………………3

PJM Interconnection, LLC,
110 FERC ¶ 61,234 (2005)..………………………………………………4

TABLE OF AUTHORITIES

PAGES

ADMINISTRATIVE CASES: (con't)

* *Tennessee Gas Pipeline Co.,*
71 FERC ¶ 61,001 (1995)……………………………………………13,19,29

Tennessee Gas Pipeline Co.,
73 FERC ¶ 61,083 (1995)……………………………………………...30

Tennessee Valley Municipal Gas Assn.,
140 F.3d 1085 (1998)…………………………………….……………22

Williston Basin Interstate Pipeline Co.,
56 FERC ¶ 61,194 (1991)………………………………………………5

STATUTES:

Federal Power Act

Section 205, 16 U.S.C. § 824d……………………………………..2,20,24

Section 205, 16 U.S.C. § 824d(e)……..…….…………………………..19

Section 301, 16 U.S.C. § 825..………….……………………………4,23,24

Section 301, 16 U.S.C. § 825(b)…..………………………………….2,24

Section 301, 16 U.S.C. § 825(c)……………………………………..…..23

Section 313, 16 U.S.C. § 825*l*(b)………………………………………..14

TABLE OF AUTHORITIES

PAGES

REGULATIONS:

18 C.F.R. Part 101, Account 105C……………………………………….…24

18 C.F.R. Part 101, Account 108E…………………………………………24

18 C.F.R. Part 101, Account 182.1A……………………………………..24

18 C.F.R. Part 101, Account 182.3….……………………………2,4,5,6,8,23,24

18 C.F.R. Part 101, Account 439(A)…………….…………….…………...24

18 C.F.R. Part 101, Definition 30 A & B……………………………..5,6

18 C.F.R. Part 101, Instruction 5…………………………………………24

GLOSSARY

Dominion	Virginia Electric and Power Company doing business as Dominion Virginia Power
FPA	Federal Power Act
Initial Order	*PJM Interconnection, L.L.C.*, 109 FERC ¶ 61,012 (2004)
PJM	PJM Interconnection, L.L.C.
Rehearing Order	*PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,234 (2005)
Virginia Commission	Petitioner Virginia State Corporation Commission
Virginia Counsel	Petitioner Virginia Division of Consumer Counsel

IN THE UNITED STATES COURT OF APPEALS
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FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the challenged orders, as petitioners have failed to demonstrate that they have sustained any definite injury flowing from the procedural guidance offered by the Federal Energy Regulatory Commission (Commission or FERC) on a particular accounting issue.

2. Assuming jurisdiction, whether the Commission reasonably exercised its procedural discretion in declining to decide now whether certain costs of Virginia

Electric and Power Company, doing business as Dominion Virginia Power (Dominion), were appropriate for regulatory asset treatment under the Commission's accounting regulations, 18 C.F.R. Part 101, Account 182.3, as Dominion's recovery of those costs would be an issue in its next rate case under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

COUNTER STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under FPA section 313, 16 U.S.C. § 825*l*(b). However, as demonstrated in Point I of the Argument below, petitioners do not have standing to bring their claims before this Court, in that they have not suffered, and are not in imminent peril of suffering, any injury caused by the Commission's guidance on utility accounting, or that can be redressed by the Court on appeal.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

On May 11, 2004, as amended on July 23, 2004, Dominion and PJM Interconnection, L.L.C. (PJM) filed a joint proposal with the Commission, pursuant to FPA section 205, to establish PJM as the Regional Transmission

Organization for Dominion, under an expansion arrangement to be known as PJM South. R 1 (JA 1); R 53 (JA 7). Previously, Dominion and other applicants had sought to form a Regional Transmission Organization under the name Alliance Regional Transmission Organization, but their request had been rejected by the Commission. *Alliance Companies, et al.*, 97 FERC ¶ 61,327 (2001).

As relevant here, Dominion requested that the Commission approve for regulatory asset treatment all wholesale and retail costs associated with developing the ill-fated Alliance Regional Transmission Organization, all retail and wholesale costs associated with integrating Dominion into PJM, and retail PJM administrative fees. R 1 at 17-22 (JA 18-23). Dominion sought permission to record these costs in Account 182.3 of the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 C.F.R. Part 101, "in anticipation of a future rate filing under [FPA] Section 205 to recover such costs upon the expiration" of a cap set on retail rates by the State of Virginia. *Id.* at 17 (JA 18).

On October 5, 2004, the Commission issued the first order on appeal, approving the establishment of PJM South, subject to certain conditions. *PJM Interconnection, L.L.C.*, 109 FERC ¶ 61,012 (2004), R 57 (JA 127-152) (Initial Order). With respect to Dominion's request for regulatory asset treatment of its Regional Transmission Organization start-up costs, the agency set out the

requirements for a utility to record such costs, but declined to decide whether such accounting treatment was appropriate in this case. *Id.* at P 50-54 (JA 145-147).

Several parties, including petitioners Virginia State Corporation Commission (Virginia Commission) and the Virginia Division of Consumer Counsel (Virginia Counsel), sought clarification and/or rehearing before the Commission concerning Dominion's proposed regulatory asset treatment of its Regional Transmission Organization costs. On March 4, 2005, the Commission issued an order which, *inter alia*, denied rehearing on this issue. The Commission once again declined to decide the regulatory asset issue, emphasizing that recovery by Dominion of the contested costs would not be decided until Dominion's next rate case. *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,234 (2005), R 79 (JA 281-295) (Rehearing Order).

II. STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

The Commission's authority to require public utilities to maintain uniform accounts, subject to Commission inspection and review, is found in section 301 of the FPA, 16 U.S.C. § 825. The regulations governing the Uniform System of Accounts for public utilities are found in Part 101 of the Commission's Rules and Regulations, 18 C.F.R. Part 101.

These accounting regulations are, however, solely designed to aid the

Commission in carrying out its ratemaking functions. Decisions made pursuant to the Uniform System of Accounts are not determinative in a ratemaking proceeding. As the Commission has explained (with respect to the analogous accounting provisions for natural gas companies):

> Accounting practices are not controlling for ratemaking purposes and deviations from normal accounting practices must be made where necessary to insure that rates established by the Commission are just and reasonable.

Consolidated Gas Supply Corp., 14 FERC ¶ 61,029 at 61,054 (1981); *see also, e.g., Williston Basin Interstate Pipeline Co.*, 56 FERC ¶ 61,104 at 61,370 (1991) ("The Commission is not bound by accounting principles in determining whether proposed rates are just and reasonable").

Under Account 182.3 of the Commission's accounting regulations, "Other regulatory assets," public utilities are instructed that they "shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies." 18 C.F.R. Part 101, Account 182.3. This accounting instruction refers to the definition, elsewhere in the regulations, of Regulatory Assets and Liabilities as

> assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from 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; or B. in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required.

18 C.F.R. Part 101, Definitions, No. 30.

Under this definition, the Commission has explained, utilities may record certain of their costs as regulatory assets for accounting purposes where they "are both unrecoverable in existing rates and . . . it is probable that such costs will be recoverable in future rates." *Midwest Independent System Operator, Inc.*, 103 FERC ¶ 61,205 at P 22 (2003). However, the Commission has made plain that "[t]he establishment of a regulatory asset account does not determine whether the Commission will permit the recovery of those costs, nor . . . affect in any way parties' rights to raise any argument regarding recovery of those costs" in a later rate proceeding. *Equitrans, L.P.*, 106 FERC ¶ 61,340 at P 23 (2004) (footnote omitted).

B. Development of Dominion's Proposal

As this Court is aware, the Commission in recent years has encouraged electric utilities to join Regional Transmission Organizations that operate the transmission systems of multiple utilities on an independent, non-discriminatory basis. *See*, *e.g.*, *Public Utility Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 610-612 (D.C. Cir. 2001); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364-1365 (D.C. Cir. 2004).

In furtherance of the Commission's initiatives, Dominion spent several years developing, with several other transmission-owning utilities, the Alliance Regional Transmission Organization. That effort ultimately proved unsuccessful. *See Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067 (D.C. Cir. 2005) (explaining doomed history of Alliance).

Dominion then turned its attention to PJM, the operator of the transmission grid in various Mid-Atlantic and (recently) Midwestern states. *See Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 5 (D.C. Cir. 2002) (explaining evolution and operation of PJM). In the instant proceeding, Dominion -- which operates facilities and serves retail customers in Virginia and North Carolina -- proposed to operate as "PJM South." R 1 at 1 (JA 1). As part of its proposal, Dominion sought FERC approval of its plan to record, as a regulatory asset under the Commission's accounting regulations, costs related to the development of the Alliance Regional Transmission Organization ($14.4 million) and costs related to the development of PJM South and its operation through 2010 ($265 million). *Id*. at 17 (JA 18).

C. The Orders on Review

1. The Initial Order

In its lengthy Initial Order, the Commission conditionally approved the creation of PJM South. As relevant here, with respect to Dominion's requested accounting, the Commission stated that it would "approve Dominion's request" for

regulatory asset treatment for its Regional Transmission Organization start-up costs, "subject to the discussion below." Initial Order at P 50 (JA 145). The agency explained that, as it had previously recognized, "before receiving the commercial benefits of being integrated" with a Regional Transmission Organization, "start-up costs must be incurred" by applicants such as Dominion. *Id.* at P 50 (footnote and citation omitted). Because costs incurred in periods "apart from the anticipated benefit period . . . should be allocated to the periods when the related benefits are expected to be realized," the Commission opined, they "must be recorded initially as an asset, deferred, and then amortized to expense over the anticipated benefit period." *Id.* (JA 145-146) (footnotes omitted).

The Commission concluded that Dominion's proposed "deferral of its PJM South start-up costs" was consistent with "this principle." *Id.* at P 51 (JA 146). However, the Commission went on to observe, "these deferred costs," including the Alliance start-up costs, "must begin to be amortized to expense on the date that Dominion integrates its transmission assets into PJM South." *Id.*[1]

The Commission then turned to the potential treatment of Regional Transmission Organization start-up costs as a regulatory asset under the agency's Uniform System of Accounts. Definition No. 30 of these regulations, 18 C.F.R.

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[1] While Dominion sought similar treatment for PJM's administrative fees, the Commission held that those services benefit the period in which the services are provided, and thus should be "charged to expense in these periods." Initial Order at P 52 (JA 146).

Part 101, the Commission explained, "provides that a regulatory asset is to be recognized when amounts otherwise chargeable to expense in the current period are to be recovered in rates in a future period." *Id.* at P 53 (footnote omitted) (JA 146). "To qualify as a regulatory asset" in accordance with this definition, the agency went on to state, "there must be a showing both (i) that the costs at issue are unrecoverable in existing rates and (ii) that it is probable that such costs will be determined to be recoverable in future rates." *Id.* at P 53 & n.54, citing *Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,205 at P 22 (2003) (JA 146).

While Dominion proposed to record costs associated with the PJM South and Alliance start-ups, as well as PJM South's administrative fees, as a regulatory asset in Account 182.3 of the Uniform System of Accounts, the Commission noted that the Virginia Commission had raised "questions as to whether" these costs "are actually unrecoverable in Dominion's current rates and whether the costs will be recovered in the future." *Id.* at P 53 (JA 146-147). Therefore, the Commission went on to conclude:

> At this time, we cannot determine with certainty that all of the costs at issue are, in fact, unrecoverable in Dominion's current retail and wholesale rates or whether all such costs, if deferred, will ultimately be found, in a section 205 proceeding, to be recoverable in future rates. Therefore, Dominion must assess all available evidence bearing on the likelihood of rate recovery of these costs in periods other than the period they would otherwise be charged to expense under the general accounting requirements for costs, as discussed above. If

> based on such assessment, Dominion determines that it is probable that these costs will be recovered in rates in future periods, it should record a regulatory asset for such amounts.

Id. at P 54 (JA 147).

2. The Rehearing Order

Several parties sought rehearing on a number of issues. The Virginia Commission (R 63) (JA 177) and the Virginia Counsel (R 64) (JA 229), each filed rehearing requests for clarification and/or rehearing challenging the Initial Order with respect to Dominion's proposal to book Regional Transmission Organization start-up costs as a regulatory asset.

In the Rehearing Order (R 79) (JA 281), the Commission denied the requests of both petitioners. While the Initial Order had "acknowledg[ed] Dominion's request to record its claimed [Regional Transmission Organization] Costs as a regulatory asset," it had "made no finding" there "regarding the ultimate justness and reasonableness of these costs." *Id.* at P 38 (JA 293). "Such findings," the agency continued, "can only be made at the time that Dominion makes its section 205 filing seeking to recover such costs in its rates." *Id.* at P 39 (JA 293).

In the Commission's view, the Initial Order had provided only "guidance . . . regarding the proper accounting and recordation of a regulatory asset." *Id.* That guidance was "procedural in nature and thus without prejudice to any party seeking to challenge the subsequent recoverability of these costs in a future rate case." *Id.*

Turning to the accounting regulations themselves, the Rehearing Order observed that Account 182.3 "require[s] that Dominion, not the Commission," must determine whether the costs at issue qualify for recording as a regulatory asset, "based on generally accepted accounting principles." *Id.* at P 40 (JA 293). "This means," the Commission stated:

> that Dominion must support its determination with relevant, reliable evidence demonstrating that it indeed meets the criteria for recognition of a regulatory asset . . . at the time it makes the initial determination, each accounting period thereafter, and when it makes its section 205 filing.

Id.

The Commission rejected the contention that its guidance with respect to regulatory asset accounting treatment "represent[ed] a clear divergence" from the agency's earlier orders on the subject. *Id.* at P 31 & n.21; P 41 (JA 291; 294) (citing *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,279 (2003), 103 FERC ¶ 61,205 (2003), 106 FERC ¶ 61,337 (2004)). In those orders, like the orders here, the Commission explained, no finding was made regarding the "recoverability of a regulatory asset," as there was "no such rate proposal" pending. *Id.* at P 41 (JA 294). Rather, the agency had merely "provided guidance applicable to any transmission owner seeking to recover a regulatory asset in its rates." *Id.*

SUMMARY OF ARGUMENT

I.

As petitioners cannot demonstrate that they are injured by the Commission's orders, which merely provided accounting guidance concerning a utility's ability to record a regulatory asset, they do not have standing to bring this appeal.

While both petitioners represent the interests of Dominion's Virginia ratepayers, the contested orders have no effect on either the retail or wholesale rates such ratepayers will pay Dominion, now or in the future. Even assuming the Commission has improperly applied its accounting regulations, ratepayers will not incur any legally cognizable injury unless and until the Commission allows Dominion to recover those costs in a future rate proceeding. Nor will any particular accounting treatment of the contested costs have any influence on a future rate proceeding, in which Dominion will have the burden of showing that it is just and reasonable to recover those costs.

II.

Assuming jurisdiction, the Court should affirm the Commission's orders, which represent a reasonable exercise of the agency's broad procedural discretion.

Nothing in the relevant statute or regulations mandates any particular procedure concerning the Commission's review of a utility's accounting of a regulatory asset. The Commission recognized that whatever accounting treatment

was claimed by Dominion, any impact of the contested costs would be resolved in the company's next rate proceeding. The Commission, therefore, reasonably declined to further investigate the matter at this juncture, merely giving procedural guidance to Dominion in the orders on appeal.

The Commission's action does not represent any improper delegation of authority. Like most of the agency's Uniform System of Accounts, the regulatory asset regulation is self-implementing, subject to subsequent Commission review. Nor was the Commission's determination not to make a decision on Dominion's regulatory asset proposal contrary to any particular precedent. Indeed, in *Tennessee Gas Pipeline Co.*, 71 FERC ¶ 61,001 (1995), the Commission declined to disturb its Chief Account's approval of a regulatory asset account based solely on the unsubstantiated statements of the company, stating that it would address whether the costs could be recovered in the utility's next rate case.

ARGUMENT

I. THE PETITIONS FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION, AS PETITIONERS HAVE NOT ALLEGED AN INJURY THAT CAN BE REDRESSED BY THE COURT DERIVING FROM THE COMMISSION'S ACCOUNTING GUIDANCE

Under FPA section 313(b), 16 U.S.C. § 825*l*(b), only a party that is "aggrieved" by a Commission order may obtain judicial review. *See, e.g., Public Utility District No. 1 of Snohomish,* 272 F.3d at 613.[2] An "aggrieved" petitioner must meet the constitutional standing requirements. *See, e.g., Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 366 (D.C. Cir. 1998). These requirements are that: (1) a petitioner must have suffered an "injury in fact" – an "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) there must be a "causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to be merely speculative, that the injury will be

[2] The Commission initially moved to dismiss these appeals for lack of ripeness, *see* Motion to Dismiss Petitions As Unripe (July 25, 2005). By its Order issued on November 1, 2005, the Court referred the jurisdictional issue to the merits panel and directed the parties to address it in their briefs. However, upon further research and reflection, the Commission believes that the more accurate jurisdictional argument is that the petitioners have no standing to bring this appeal. Of course, as the Court has recognized, the issues of ripeness and standing "overlap significantly," and involve many of the same considerations. *Alabama Municipal Distributors Group v. FERC*, 312 F.3d 470, 472 (D.C. Cir. 2002); *see also New York State Electric & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 n.4 (D.C. Cir. 1999) (citation omitted).

redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations and quotation marks omitted); *Alabama Municipal Distributors Group v. FERC*, 312 F.3d 470, 472 (D.C. Cir. 2002). Accordingly, "[t]he burden on a party challenging an administrative decision in the court of appeals is 'to show a substantial probability that it has been injured, that the defendant caused its injury, and that the court could redress that injury.'" *Village of Bensenville v. FAA*, 376 F.3d 1114, 1118 (D.C. Cir. 2004) (quoting both *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) and *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)).

In this case, petitioners cannot meet their burden to demonstrate an injury inflicted by the contested orders, which could be redressed by this Court. This is because the Commission, acting on the request for regulatory asset accounting of the costs in question, simply provided "guidance" that was "procedural in nature," "without prejudice to any party seeking to challenge the subsequent recoverability of these costs in a future rate case." Rehearing Order at P 39 (JA 293).

Petitioners here both represent the interests of Dominion's Virginia ratepayers. But the Commission's accounting guidance has no effect on Dominion's ratepayers, as it has no effect on the rates they are paying Dominion, or will pay in the future. The ratepayers' risk of injury is conjectural at best: they will only suffer an injury that can be redressed when and if Dominion prevails, in

its next section 205 rate case before the Commission, on the issue of including the Regional Transmission Organization start-up costs (and administrative fee costs) in its new rates. *See* Rehearing Order at P 38 (JA 293) (The Commission "made no finding regarding the ultimate justness or reasonableness of these costs"). A final order in such a rate proceeding would, naturally, be reviewable by this Court.

Petitioners' specific allegations of a legally-cognizable injury do not come close to meeting the applicable standard. Indeed, petitioners admit in their briefs the speculative nature of the harm alleged. *See* Virginia Commission Br. at 17 (FERC's action will "potentially . . . shift" costs to ratepayers); 43 ("FERC has, in effect, put future Virginia retail ratepayers at risk" for these costs); Virginia Counsel Br. at 2 (Dominion "will seek recovery" of the rates upon expiration of the retail rate cap); 24 (FERC's decision "makes it more likely" that Virginia consumers will have "substantial rate increases" in the future). Tellingly, the petitioners do not challenge any decisive action by the Commission. Rather, they challenge only the Commission's "failure to reject" summarily Dominion's proposal at this time. Virginia Commission Br. at 1, 21; *see also* Virginia Counsel Br. at 3 (challenging FERC's "refusal to rule"), 9 ("refusal to decide").

The Virginia Commission nonetheless maintains that harm has been suffered by "retail ratepayers and investors [that] is immediate and cognizable today because FERC has violated its own regulations" concerning accounting treatment

of a regulatory asset. Virginia Commission Br. at 47. The Court has recognized such injury for purposes of standing, the Virginia Commission asserts, in *CNG Transmission Corp. v. FERC*, 40 F.3d 1289 (D.C. Cir. 1994), where the utility petitioner sought review of FERC's denial of its request to treat certain natural gas losses as a regulatory asset.

The *CNG Transmission* case, however, does not support petitioners' standing here. There, it is true, the Court found that the utility petitioner was aggrieved by FERC's rejection of the proposed treatment of certain costs as a regulatory asset under the agency's Uniform System of Accounts. This was because, however, the utility petitioner itself could demonstrate a concrete and non-speculative injury specifically arising from the Commission's accounting treatment of its costs:

> As a direct result of FERC's decision, CNG [Transmission Corporation] is required to record a $7.1 million loss in its 1993 financial statements, adversely affecting the company's bottom line, reducing the earnings available for dividend payments and investment, and damaging the company's standing in financial markets by reducing company value and making it more difficult (and more costly) to raise capital.

40 F.3d at 1293.

While the *CNG Transmission* case may provide a basis for Dominion to challenge an adverse regulatory asset determination by the Commission, it does not provide one to Dominion's customers.

The Virginia Commission goes on to weave a complicated scenario involving state retail rates to demonstrate that the contested orders have "an immediate rate impact on Dominion's retail consumers in Virginia today." Virginia Commission Br. at 48. The fact is, however, that the Commission's failure to make a finding with respect to regulatory asset treatment of the start-up costs simply does not affect Dominion's customers in any manner. Any effect of the costs at issue will not be felt unless and until the Commission approves the inclusion of the contested costs in Dominion's rates sometime in the future. In sum, the contested orders have no impact on any of Dominion's rates, wholesale or retail.

Nor do the Commission's orders (or any action by Dominion based on those orders) have any effect on the course of Dominion's future rate case. As explained *supra* page 5, the Commission's accounting rules do not govern its ratemaking. Thus, as the Commission made plain in the orders on review, regardless of whether or when Dominion books the start-up costs in a regulatory asset account, it can seek to recover these costs from ratepayers represented by petitioners only in a future rate case. *See* Initial Order at P 54 (JA 147); Rehearing Order at P 38 (JA 293). Moreover, Dominion's accounting treatment of the contested costs has no influence on whether they will be ultimately recovered in a future rate proceeding. When Dominion files its rate case before FERC, it will have the burden of

demonstrating that it is just and reasonable to include these costs in its new rate, no matter how the costs have been booked for accounting purposes. *See Equitrans, L.P.*, 106 FERC ¶ 61,340 at P 23; *Tennessee Gas Pipeline Co.*, 71 FERC ¶ 61,001 at 61,002 (1995). *See also, e.g., Alabama Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993) ("the party filing a rate adjustment with the Commission under § 205 bears the burden of proving the adjustment is lawful") (citing 16 U.S.C. 824d(e) (additional authority omitted)).

The Virginia Commission next attempts to conjure standing by alleging an injury arising from the fact that Dominion could, without hindrance by the Commission, "reflect unauthorized accounting treatment of more than $275 million for at least six years." Virginia Commission Br. at 48. "Immediate harm" results, according to the Virginia Commission, because "these accounting records will be relied upon by federal and state regulators as well as investors in evaluating Dominion's financial health and activities." *Id.*

However, even assuming that the Virginia Commission can assert the rights of Dominion's current or potential investors (much less federal regulators),[3] the

[3] To the extent petitioners champion the rights of Dominion investors, rather than Virginia ratepayers, they lack prudential ("zone of interests") standing under the FPA. *See*, *e.g.*, *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 954-58 (D.C. Cir. 2000) (applying prudential standing principles to review under the FPA "aggrievement" standard). *See also* Virginia Commission Br. at 4 (role is to regulate the rates, terms and conditions of utility service in Virginia); Virginia Counsel Br. at 2 (role is to represent Virginia consumers).

"harm" claimed is both intangible and extremely speculative. Presumably, a reasonably prudent investor sophisticated enough to review Dominion's accounts would be aware that the claim of a regulatory asset on the company's books is no guarantee of subsequent rate recovery (and probably be aware, as well, of the circumstances surrounding Dominion's joining PJM South, a major change for the company). Moreover, this contention is based on the theory that an investor will make an investment decision solely determined by this one piece of allegedly misleading accounting information and, as a direct result, will suffer a financial loss. Such attenuated causation can hardly be described as direct or immediate.

Virginia Counsel makes substantially the same allegations of injury made by the Virginia Commission, but adds that "FERC's refusal to decide, prior to a FPA § 205 ratemaking proceeding after 2010, will result in dispositive issue preclusion, to the distinct disadvantage of Virginia consumers." Virginia Counsel Br. at 24, citing *Alabama Municipal*, 312 F.3d at 473.

Virginia Consumers' argument, however, is based on a misreading of the *Alabama Municipal* case, which rejects issue preclusion as a basis for standing: "[I]n fact, it seems inescapable that neither standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect." 312 F.3d at 474. This would seem particularly true here, where any decision concerning

regulatory asset treatment will have no effect of any kind on Dominion's future rate case. *See AT&T Corp. v. FCC*, 317 F.3d 337, 238 (D.C. Cir. 2003) (standing based on collateral estoppel only possible where actual injury demonstrated).

In sum, the situation in this case is similar to that presented by *Alabama Municipal*. In that case, the Commission issued a certificate of public convenience and necessity to Southern Natural Gas Company, under which a new customer would pay a discount rate. Existing, non-discounted customers on the company's pipeline system appealed the decision, arguing that the discount rate to the new customer was not justified. This Court dismissed the existing customers' petition for review of the certificate decision for lack of standing, because the customers were "unable to demonstrate any connection between the allegedly improper FERC action and higher prices." 312 F.3d at 472. Rather, the Court indicated, the effect of the certificate transaction "on petitioners' rates will be decided in Southern [Natural Gas Company]'s next rate case." 312 F.3d at 473. Here, as we have described, how Dominion books these costs will have no effect on Dominion's customers; rather, whether such costs will be included in Dominion's rates will be determined in its next rate case.

II. THE COMMISSION'S DECISION TO DEFER RULING ON THE RECOVERABILITY OF DOMINION'S COSTS UNTIL ITS RATE CASE WAS A REASONABLE EXERCISE OF THE AGENCY'S PROCEDURAL DISCRETION

A. Standard of Review

This Court has long recognized that the Commission's orders should be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *E.g., Consolidated Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003). Because the Commission has "broad discretion" concerning procedural matters, the Court will only remedy an abuse of that discretion. *Tennessee Valley Municipal Gas Assn. v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998).

B. The Commission Reasonably Exercised Its Discretion at This Juncture by Declining to Decide Whether Regulatory Asset Accounting Was Appropriate for the Costs at Issue

In the orders on review, the Commission held that it did not have sufficient evidence to determine whether Dominion could book certain Regional Transmission Organization start-up costs as a regulatory asset under Account No. 182.3 of the Commission's Uniform System of Accounts. Therefore, the agency declined to make a decision concerning the propriety of regulatory asset accounting treatment for the costs at issue. Rather, it advised Dominion to "assess all available evidence bearing on the likelihood of rate recovery of these costs in periods other than the period they would otherwise be charged to expense under

the general accounting regulations for costs," in accordance with the guidance provided in the order and to record such amounts as a regulatory asset if they met this standard. Initial Order at P 54 (JA 147). The Commission further advised Dominion that it "must support its determination with relevant, reliable evidence, demonstrating that it meets the criteria for a regulatory asset." Rehearing Order at P 40 (JA 293). The Commission's action was reasonable, consistent with the relevant regulation, and in accord with agency precedent.

Like most of the provisions of the Uniform System of Accounts in Part 101 of the Commission's regulations, Account 182.3 is an instruction to a regulated company how to make a particular accounting determination. Neither Account 182.3 specifically nor the Uniform System of Accounts generally includes a provision for prior Commission review. Rather, section 301 of the FPA, 16 U.S.C. § 825, and the Uniform System of Accounts assure that the relevant accounting records are available for inspection and review by the Commission in an audit or investigation. *See* 16 U.S.C. § 825(b) ("The Commission shall at all times have access to and the right to inspect and examine all accounts" of public utilities); 16 U.S.C. § 825(c) ("the books, accounts, memoranda and records of any" public utility "shall be subject to examination on the order of the Commission"). Unlike the section of the FPA governing rate review, 16 U.S.C. § 824d, section 301 of the Act does not prescribe any particular time, manner or vehicle for Commission

review of accounting determinations, and the accounting regulations generally follow this pattern.[4]

It bears emphasis that certain other Part 101 accounting regulations implementing FPA section 301 do require preliminary review by the Commission. For instance, Account 439, for adjustments to retained earnings, states that "[t]his account shall, *with prior Commission approval*, include significant nonrecurring transactions accounted for as prior period adjustments." 18 C.F.R. Part 101, Account 439(A) (emphasis added). *See also, e.g.*, 18 C.F.R. Part 101, Account 105C (Commission approval necessary to remove certain property from account governing electric plant held for future use); Account 108E (transfer of any portion of major plant depreciation account requires Commission approval); Account 182.1A (Commission must authorize recording of certain extraordinary property losses). Thus, in instances where the Commission believed its prior approval was required for a public utility to employ certain accounting mechanisms, it specifically stated so in its accounting regulations.

In sum, nothing in the Commission's regulations requires that a utility's booking of a regulatory asset under Account 182.3 must be reviewed at all, much less at a particular time. Thus, the Commission's determination that it would

[4] Utilities are, however, enjoined to "submit questions of doubtful interpretation to the Commission for consideration and decision." General Instruction 5, 18 C.F.R. Part 101.

decline to rule on Dominion's request for regulatory asset treatment was fully consistent with its regulations.

Furthermore, the Commission's declining to so rule was reasonable under the circumstances. The Commission recognized that the real matter of concern to the protestors was whether the start-up costs would be included in the rates of Dominion's customers, an issue which would be fully ventilated at the time of Dominion's next section 205 rate case. Thus, the Commission was merely exercising the "broad discretion to determine when and how to hear and decide the matters that come before it," recognized by this Court. *Tennessee Valley Municipal Gas Ass'n*, 140 F.3d at 1088 (citing *Mobil Oil Exploration v. United States*, 498 U.S. 211, 230 (1991); *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1314-15 (D.C. Cir. 1991); *GTE Service Corp. v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1986)).

Petitioners assert that the Commission's abstaining from a decision on whether Dominion could record the contested costs as a regulatory asset is unreasonable. In their view, Dominion's proposal is inconsistent with the standard for establishing a regulatory asset. Thus, the Virginia Commission maintains that

> [b]ecause FERC could not determine that Dominion had made any of the requisite demonstrations, *i.e.*, the resulting insufficiency of current rates, and the likelihood of future recovery, and it did not identify a ratemaking action of regulatory agency, FERC should have denied regulatory asset treatment.

Virginia Commission Br. at 38. Alternatively, the Virginia Commission asserts, the Commission should have "instituted a hearing or required the submission of additional information upon which it could reach a factual determination on disputed questions of fact." *Id.* at 27. Similarly, Virginia Counsel argues that "[a] correct application of the regulatory asset standard" requires that "if FERC did not find that Dominion made the requisite showing," the Commission "must deny Dominion's request for regulatory asset treatment." Virginia Counsel Br. at 19.

Petitioners' argument notwithstanding, the Commission was under no obligation, at this time, to decide summarily that Dominion's proposal was inconsistent with its requirements for regulatory asset accounting. The determination of whether the disputed costs qualify for regulatory asset accounting (current unrecoverability of costs, probable future recovery in rates) is fact-specific. *See* Initial Order at P 53 (JA 146-147). However, the Commission did not have sufficient facts to make, and Dominion had not submitted sufficient evidence to allow, a definitive decision. *Id*. at P 54 (JA 147); Rehearing Order at P 40 (JA 293).

In these circumstances, the Commission certainly had the authority to require that Dominion submit additional information, or to set an evidentiary hearing on the matter. The Commission, however, quite sensibly chose not to get embroiled at this juncture in an accounting dispute with no rate consequences,

rather than expend further resources on the matter. In so doing, "the Commission was merely exercising its well-established discretion to "order [its] own proceeding and control [its] own docket[]." *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d at 1315, quoting *Association of Businesses Advocating Tariff Equity v. Hanzlik*, 779 F.2d 6907, 701 (D.C. Cir. 1985).

C. Petitioners Cannot Establish that the Commission Abused Its Procedural Discretion by Declining to Reach the Merits

The Virginia Commission contends that FERC violated its regulations "in allowing Dominion to decide whether to treat the costs at issue as a regulatory asset." Virginia Commission Br. at 29. Virginia Counsel takes this argument a step further, asserting that, by allowing Dominion to decide the regulatory asset question, the Commission has run afoul of the presumption against agency subdelegation, as recognized by this Court in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). Virginia Counsel Br. at 11-12. This contention, no matter how framed, is without merit.

First, as explained above, Account 182.3, in accord with most of the Commission's Uniform System of Accounts, presumes that the utility will make a decision in the first instance concerning the proper accounting treatment of costs that it incurs. Furthermore, Account 182.3 does not prescribe approval in advance by the Commission or any other particular procedure for the company to follow.

Thus, the Commission's ruling here that Dominion should make a determination of whether the contested costs can be booked as a regulatory asset, based on "relevant, reliable evidence," Rehearing Order at P 40 (JA 293), is completely consistent with the language of account 182.3.

Nor does the Commission's course represent any sort of improper delegation. While the agency's accounting regulations are largely self-implementing, the accounting determinations of a regulated utility are subject to Commission review. In this case, however, the Commission simply declined to make a definitive ruling on a particular accounting proposal, preferring to take up the issue of Regional Transmission Organization start-up costs in the context of a rate case.

Petitioners also both attempt to demonstrate that the Commission abused its discretion here by failing to follow its own precedent concerning regulatory asset treatment. Virginia Commission Br. 32-37; Virginia Counsel Br. 20-21. Thus, the Virginia Commission argues that "[t]he need for FERC approval before regulatory asset treatment can be taken is obvious and embodied in numerous FERC decisions." Virginia Commission Br. at 32 (citing FERC cases).

The Virginia Commission nonetheless acknowledges that "in the absence of challenge by a protestor, FERC has on occasion exhibited a willingness to allow the public utility to decide whether to take regulatory asset treatment." Virginia

Commission Br. at 36, citing *Algonquin Gas Transmission Co.*, 107 FERC ¶ 61,251 at P 20 n.12 (2004); *Consolidated Edison Co. of N.Y.*, 86 FERC ¶ 61,064 at 61,248 (1999). Virginia Counsel makes a similar concession. *See* Virginia Counsel Br. at 21 n.11.[5]

Thus, as petitioners begrudgingly recognize, the Commission has never specifically found that it must review a utility's recording of a regulatory asset. Also, in the cases in which the Commission does review regulatory asset treatment, the result largely depends on the specific facts presented.[6] Thus, while the deciding authority (the Commission or its Chief Accountant) can generally make a decision as to the propriety of regulatory asset treatment based on the evidence submitted by the company, some cases, of which this is one, simply do not lend themselves to such an easy, immediate solution.

The Commission's decision in *Tennessee Gas Pipeline Co.*, 71 FERC ¶ 61,001, is particularly instructive in this regard. There, Tennessee Gas Pipeline requested approval by the Commission's Chief Accountant that $6.7 million in particular costs should be booked as regulatory assets in Account 182.3, pending a later rate filing which would recover such costs. The Chief Accountant issued a

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[5] In truth, the Commission has taken this approach even in a protested case. *See Equitrans, LP*, 106 FERC ¶ 61,340 at P 23.

[6] In fact, such determinations are rarely protested by anybody other than the affected company because, as previously demonstrated, they have no rate consequences.

letter approving regulatory asset treatment. The retail customers of Tennessee Gas Pipeline, represented by the New York Public Service Commission, sought rehearing or clarification of the Chief Accountant's determination, on the ground that it was made "without requiring any evidence or analysis in support of Tennessee's assertion" that it could reasonably expect to recover the contested costs in a later rate filing. 71 FERC at 61,001.

The Commission denied rehearing. While the Chief Accountant had relied solely on the statements of Tennessee Gas Pipeline,[7] the Commission declined to disturb his determination, observing that the question of whether the costs were recoverable was now pending in Tennessee Gas Pipeline's subsequently-filed rate case and that "the Chief Accountant's letter is clear that his approval is only for accounting purposes" and "has no effect upon the recovery of costs claimed by Tennessee." 71 FERC at 61,002. Thus, even where a company's regulatory asset accounting had been approved based on unsubstantiated statements, the Commission preferred to deal the matter in the context of the company's rate case.

In sum, the Commission has not departed from a particular policy or line of precedent by its action here.

[7] *See also Tennessee Gas Pipeline Co.*, 73 FERC ¶ 61,083 at 61,209 n.5 (1995).

CONCLUSION

For the reasons stated, the petitions for review should be dismissed for lack of jurisdiction. Alternatively, if the Court proceeds to the merits, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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March 9, 2006
Final Brief: May 12, 2006

Virginia State Corp. Commission, *et al*. v. FERC
D.C. Cir. Nos. 05-1147, *et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that the Brief of Respondent Federal Energy Regulatory Commission contains 6,482 words, not including the table of contents and authorities, the certificates of counsel and the addendum.

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May 12, 2006