UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dominion Transmission, Inc. Docket Nos. RP03-623-003
RP03-623-004

ORDER ON COMPLIANCE FILING AND REHEARING

(Issued July 7, 2006)

1. On September 20, 2005, the Commission issued an Order on Rehearing in this proceeding (September 20, 2005 Order)[1] granting partial rehearing of an order issued October 31, 2003 (October 31, 2003 Order)[2] and directing further compliance obligations. This proceeding originally commenced on September 30, 2003, when Dominion Transmission, Inc. (Dominion) filed its annual Transportation Cost Rate Adjustment (TCRA) for the period July 1, 2002 through June 30, 2003, pursuant to section 15 of the General Terms and Conditions (GT&C) of its FERC Gas tariff.

2. In the October 31, 2003 Order, the Commission accepted revised tariff sheets, subject to Dominion filing certain tariff revisions as reflected in its Answer to a protest by an individual party, Michael J. Wilhelm (Mr. Wilhelm), who then sought rehearing of that order. The September 20, 2005 Order addressed Mr. Wilhelm's request for rehearing, granted rehearing in part and directed Dominion to provide certain additional information and explanations of its treatment of certain costs and revenues raised by Mr. Wilhelm. The background and history of this proceeding are described in greater detail in the September 20, 2005 Order.

3. On October 11, 2005, Dominion submitted a filing in compliance with the September 20, 2005 Order (Compliance Filing), which elicited comments and a protest. On October 20, 2005, Dominion filed a request for rehearing of that order, for the most part reiterating many of the arguments made in its Compliance Filing.

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[1] *Dominion Transmission, Inc.*, 112 FERC ¶ 61,321 (2005).

[2] *Dominion Transmission, Inc.*, 105 FERC ¶ 61,173 (2003).

4. As discussed below, the Commission denies rehearing. The Commission also finds that Dominion's Compliance Filing satisfies the September 20, 2005 Order only in part, and directs Dominion to make an additional compliance filing to comply with this order.

## Notice Of The Compliance Filing

5. Public notice of the Compliance Filing was issued October 14, 2005, with protests due as provided in Rule 211 of the Commission's Rules of Practice and Procedure.[3] On October 24, 2005, Mr. Wilhelm filed comments, and National Fuel Gas Distribution Corporation (National Fuel), New York State Electric & Gas Corporation, and Rochester Gas and Electric Corporation (collectively, Protesters) filed a protest to the Compliance Filing. While the comments and protest were filed after the date specified in the notice, the Commission will accept these pleadings because they do not delay or disrupt the proceeding, and they provide additional relevant information and argument for the Commission's consideration in analyzing the Compliance Filing.

## Discussion

### A. Commission Authority to Order Past Period Adjustments

#### 1. Dominion's Position

6. The overarching issue raised by Dominion on rehearing and in its Compliance Filing is whether the Commission engaged in retroactive ratemaking in the September 20, 2005 Order. In its request for rehearing, Dominion contends that the Commission held in several instances that it was not limited to imposing changes for the TCRA period at issue in this proceeding (July 1, 2002 through June 30, 2003), but that it also could require changes applicable to prior TCRA periods if warranted. Dominion argues that the Commission lacks the legal authority to require such retroactive modifications in methodology or adjustments to current rates.

7. Dominion states that the Commission seems to accept Mr. Wilhelm's theory that tracker filings are not approved, but only "accepted" and, therefore, remain open for later, retroactive reversals. Dominion points to language commonly included in Commission pipeline orders (specifically, in the Commission's order in Docket No. RP02-565 (2002 TCRA)) that "acceptance [of the filing] is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company."[4] However, Dominion

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[3] 18 C.F.R. § 385.211 (2005).

[4] Dominion cites Letter Order at 9, Docket No. RP02-565 (October 30, 2002).

claims that, if the Commission or other parties later challenge a filing accepted under NGA section 4, they must do so under NGA section 5.[5]

8. Dominion states that NGA section 5 affords the Commission the authority, upon the appropriate findings, to determine the just and reasonable rate or practice "to be thereafter observed and in force."[6] Despite that, continues Dominion, the Commission may not "force a utility to reduce its current rates to make up for overcollections in previous periods,"[7] even if it first meets the evidentiary burden established by NGA section 5.[8] Dominion further argues that these section 5 limitations apply equally to "rate rules," such as Dominion's method of calculating its TCRA.[9]

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[5] Dominion cites *Southern Railway Co. v. Seaboard Allied Milling Corp*., 442 U.S. 444, 454 (1979) (construing nearly identical provisions of the Interstate Commerce Act); *Cities of Carlisle and Neola, Iowa v. FERC*, 704 F.2d 1259, 1262 (D.C. Cir. 1983) (construing the nearly identical provisions of the Federal Power Act). Dominion asserts that it is well settled that comparable provisions of the NGA and FPA are to be construed *in pari materia*. *Kentucky Utilities Co. v. FERC*, 760 F. 2d 1321, 1325 n.6 (D.C. Cir. 1985), *citing Union Electric Co. v. FERC*, 668 F.2d 389, 392 n.1 (8th Cir. 1981); *Municipal Light Boards of Reading and Wakefiled, Mass. v. FPC*, 450 F. 2d 1341, 1347 (D.C. Cir. 1971). Moreover, contends Dominion, the Commission has cited the related holding of *Cities of Carlisle and Neola* that it has discretion in its suspension decisions in the NGA context without drawing any distinction between the statutes. *E.g.*, *Transcontinental Gas Pipe Line Corp*., 78 FERC ¶ 61,101 (1997); *Tennessee Gas Pipeline Co*., 71 FERC ¶ 61,399 (1995).

[6] 15 U.S.C. § 717d(a). Dominion cites *Office of Consumers' Council, Ohio v. FERC*, 826 F.2d 1136, 1138 (D.C. Cir. 1987) (*citing Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 389 (1959). *See also, e.g.*, *FPC v. Hope Natural Gas Co*., 320 U.S. 591,618 (1944) (*Hope*).

[7] Dominion cites *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (Williams, J. concurring in denial of rehearing) (citing *Hope*, 320 U.S. at 595-96).

[8] *Id*.

[9] Dominion cites *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 186 (D.C. Cir. 1986) (A Commission-initiated change in either the rates or their method of calculation can be accomplished only upon the agency's compliance with the strictures of section 5.). *See also, e.g., ChevronTexaco Exploration & Production Co. v. FERC,* 387 F.3d 892, 895 (D.C. Cir. 2004).

9. Dominion states that the September 20, 2005 Order required Dominion to make numerous adjustments to the manner in which it applies its TCRA, but the Commission did not meet its NGA section 5 burden in imposing that requirement. Even more fundamentally, continues Dominion, in several instances, the Commission ordered Dominion to adjust its current rates for what it now views as overcollections in prior TCRA periods that were accepted in final orders issued pursuant to NGA section 4.

10. Dominion states that the Commission bases its authority to order Dominion to adjust its rates for prior period "overcollections" (in at least one instance) on its conclusion that Dominion's tariff does not prohibit "out of period adjustments" and a general rule that such adjustments to tracker rates are appropriate "if the tariff has not been followed."[10] Dominion acknowledges that the rule against retroactive ratemaking is not violated if all parties have adequate notice that the rates are subject to later revision in a specified manner. Dominion also admits that trackers true up for over-or-under-collections in the past and thus do not thereby violate the rule against retroactive ratemaking. While Dominion also acknowledges that tracker provisions may allow for out-of-period adjustments, it emphasizes that the question turns on a case-specific interpretation of the pipeline's tariff. Dominion observes that the Commission previously has reached a variety of conclusions about the extent to which tracker provisions in various pipeline tariffs provide such notice and allow for prior period adjustments.[11]

11. Dominion contends that GT&C section 15.4.B by its unambiguous terms relates only to "out-of-period adjustments" that are made by a supplier of services to Dominion. Dominion also argues that this provision does not provide that, if it made an error in its calculation of the TCRA, such an error will be corrected retroactively. Moreover, continues Dominion, the provision certainly does not provide that, if the Commission makes a new determination about how the TCRA mechanism ought to work, it may require Dominion to make conforming retroactive adjustments. Dominion argues that its tariff simply provides no notice that such a result could occur and, therefore, this aspect of the September 20, 2005 Order violates the rule against retroactive ratemaking and exceeds the Commission's section 5 authority.

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[10] Dominion cites *Dominion Transmission, Inc.*, 112 FERC ¶ 61,321 at P 25 (2005).

[11] Dominion cites *Williams Gas Pipeline Central, Inc.*, 89 FERC ¶ 61,332 (1999), *reh'g denied*, 91 FERC ¶ 61,015 (2000) (no prior period adjustment allowed); *Transcontinental Gas Pipe Line Corp.*, 95 FERC ¶ 61,299 (2001) (prior period adjustments allowed based upon settlement statements and course of performance); *Mississippi River Transmission Corp.*, 95 FERC ¶ 61,232 (2001) (setting factual questions regarding whether prior period adjustments should be allowed for evidentiary hearing).

### 2. Commission Analysis

12. The Commission denies Dominion's request for rehearing on this issue. The Commission did not engage in improper retroactive ratemaking or exceed its authority under NGA section 5 in the September 20, 2005 Order. The Commission acted properly in ordering out-of-period corrections and clarifications to Dominion's TCRA.

13. In its order approving the uncontested settlement in Docket No. RP00-15-000,[12] the Commission recognized that CNG (now Dominion) is a downstream market-area pipeline that uses the capacity held by it and some of its customers on upstream pipelines. Further, the Commission recognized that Dominion recovers the cost of the upstream capacity through the TCRA, an Account No. 858 tracker, by way of the semi-annual filings. Dominion's customers pay a surcharge based on the costs reflected in the tracker. The cap on upstream pipeline costs was $37.5 million from November 1, 2001 through December 31, 2002. Dominion was required to absorb any costs above this level, but if the actual upstream costs fell below capped targeted amounts, Dominion was required to credit 50 percent of the savings to its customers. In a subsequent proceeding in Docket, RP00-632-000,[13] the Commission accepted an uncontested settlement addressing Dominion's September 29, 2000 filing to increase rates under its TCRA mechanism by $65 million annually.

14. In *TransColorado Gas Transmission Co*. (*TransColorado*),[14] the Commission addressed at length its policy on prior period adjustments. Describing the pipeline's tariff provision at issue as "not a model of clarity," the Commission found that it indicated the intent to provide a true-up mechanism so as not to over-recover or under-recover the costs in question in that case.[15] The Commission found that the pipeline's prior period adjustment was consistent with Commission policy and the pipeline's tariff.[16] The Commission explained that it applies a two-part test in determining whether out-of-period adjustments are warranted. The Commission stated as follows:

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[12] *CNG Transmission Corp*., 89 FERC ¶ 61,304 (1999).

[13] *Dominion Transmission, Inc*., 96 FERC ¶ 61,288 (2001)

[14] 112 FERC ¶ 61,135 (2005).

[15] *Id*. at P 9-10.

[16] *Id*. at P 9.

> [U]se of an adjustment to correct a past error that resulted in an under-recovery (or over-recovery) of FL&U is consistent with Commission precedent. It is also consistent with the very nature of fuel tracking mechanisms, which always require some adjustments for prior periods. The issue here is whether the tariff language, taken as a whole, provides notice that an adjustment for periods before the current 12-month amortization period might be allowed. In other words, whether the annualized adjustment language is an absolute bar to any other adjustment for prior periods, however reasonable. Although the Commission may have in the past more narrowly circumscribed a pipeline's right to recover prior period FL&U costs on various grounds, most recently, the Commission has applied a two-part test. Pipelines can recover FL&U costs if the underlying tariff can be read to permit FL&U recovery, and if the pipeline establishes that the losses are the type of losses for which recovery was contemplated and demonstrates with reasonable accuracy the amount of the adjustment it seeks to recover. So long as the Commission's findings are reasonable under such an approach, there is no violation of the filed rate doctrine or the rule against retroactive rate making because the shippers are on notice that the pipeline is entitled to recover these costs.[17]

15. In *TransColorado*, the Commission also cited *Mississippi River Transmission Corp*. (*MRT*),[18] observing as follows:

> In spite of MRT's tariff language that defined a 12-month recovery period for the FL&U, the Commission determined that there was no bar against prior period recovery in the tariff. Instead, we concluded that MRT had sufficiently notified its customers of such recovery by including general language that the pipeline will adjust for actual usage. . . . In light of such a provision, the Commission found that the fuel adjustment was intended to track fuel use and that neither MRT nor its customers "expected to gain or lose based on the operation of the fuel tracker."[19]

16. However, in *TransColorado*, the Commission distinguished its findings from its decision in *Williams Gas Pipelines Central, Inc*.,[20] observing that the tariff in that case

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[17] *Id*. at P 11 (footnotes omitted).

[18] 96 FERC ¶61,185 (2001).

[19] *TransColorado Gas Transmission Co*., 112 FERC ¶ 61,135 at P 12 (2005) (footnotes omitted).

[20] 89 FERC ¶ 61,332 (1999).

contained an "explicit bar" against prior period adjustments because revised reimbursement percentages must be based on actuals "for the preceding twelve month period ended September 30."[21]

17. In its analysis here, the Commission will apply the two-part test established in *TransColorado*. The first question is whether Dominion's underlying tariff can be read to permit the type of out-of-period adjustments ordered by the Commission and does not expressly bar such adjustments and, thus, provides sufficient notice of such potential adjustments. The Commission finds that it can be so read.

18. Section 15 of the GT&C was established by settlement and describes the manner in which Dominion recovers "Transportation Costs" reflected in balances in the "Unrecovered Transportation Cost Account" through the collection of "Unrecovered Transportation Cost Surcharges." Section 15 defines "Transportation Costs" in pertinent part as "costs incurred by Pipeline as described in section 15.7 for the Transmission and Compression of Gas by Others, Account No. 858." Section 15.4.A provides for such costs to be recorded in the "Unrecovered Transportation Cost Account" as a subaccount to Account No. 186. Section 15.5.A provides that each November 1, the pipeline "shall adjust its rates either positively or negatively to include a surcharge to recover or return the balance in the Transportation Cost Account . . . as of the preceding June 30." Accordingly, these provisions give notice that any amounts properly recorded in the Unrecovered Transportation Cost Account as of June 30 each year are to be used to determine the next period's TCRA rates. There is no restriction on what entries may be made to the account, other than that they must be Account No. 858 costs; nor is there any limitation as to what time period such accounting entries must relate or when such account entries may be made. This interpretation of the section 15 TCRA process is consistent with section 15.5.B which applies the settlement's revenue sharing feature. Section 15.5.B provides, in pertinent part, as follows:

> Pipeline will calculate the difference between "Actual Transportation Costs" and "Current Transportation Costs." "Actual Transportation Costs" shall include: [i] all costs of transactions identified in General Terms and Conditions section 15.7 or successor transactions.

19. The difference between the "Actual" costs and "Current" costs (which is defined by settlement and section 15.3 to be $37,484,997) is then used to adjust the Unrecovered Transportation Cost Surcharges pursuant to sections 15.5.C and D. The requirement to use "Actual" costs in the calculation, thus, gives notice that inaccurate costs are not to be used and should be corrected. Further, there is no time limitation on what "Actual" costs are to be used or when such corrections to the account balances can be made, other than

[21] *TransColorado Gas Transmission Co.*, 112 FERC ¶ 61,135 at P 15 (2005).

that the services rendered must have been after January 1, 2000, the date established by settlement. Contrary to Dominion's assertion, the fact that section 15.4.B addresses out-of-period adjustments "received by Pipeline" does not preclude other out-of-period adjustments.[22] The Commission finds that it does not bar any other types of out-of-period adjustments so long as they relate to services performed for Dominion after January 31, 2000.

20. The second prong of the *TransColorado* test requires the pipeline to establish that any losses to be recovered are the type for which recovery is contemplated and demonstrate with reasonable accuracy the amount to be recovered. The Commission finds that the underlying settlements and section 15, which resulted, were intended to be consistent with the Commission's general policy on trackers -- that the pipeline will not over-recover or under-recover its costs – and that corrections to TCRA rates must be made to ensure that there is no over or under-recovery of costs irrespective of to what period of time the corrections relate. In this case, the Commission has found in a series of orders that Dominion's 2003 TCRA filing did not fully meet the requirement of supporting its filing in a manner that allows the Commission to determine whether the amounts at issue are reasonably accurate. Because trackers are intended to keep the parties whole, the Commission did not violate NGA section 5 in requiring Dominion to correct erroneous calculations.

21. Finally, contrary to Dominion's assertion, acceptance of prior TCRA filings does not preclude adjustments to subsequent TCRA rates to correct errors. Each TCRA filing reflects the balances in the appropriate TCRA accounts and subaccounts as of June 30 of that particular year. The effect of the Commission's orders is to require an adjustment to the appropriate account balances and, in accordance with the tariff, such revised balances form the basis for the next subsequent TCRA rate filing. Thus, acceptance of TCRA rates in one period based on account balances as of the preceding June 30, does not in any way bar subsequent revisions to the account balances and the appropriate recognition of such balances in the calculation of subsequent TCRA rates.

22. Accordingly, the Commission denies rehearing on the question of its authority to require out-of-period adjustments to Dominion's TCRA.

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[22] Section 15.4.B provides in part: "All Transportation Cost refunds applicable to services performed for Pipeline prior to February 1, 2000, surcharges, and out-of-period adjustments (collectively, "adjustments") received by Pipeline, applicable to services performed for Pipeline during the period this section 15 remains effective, shall be debited or credited to the appropriate subaccount."

### B. Limiting TCRA Corrections to the July 2002 through June 2003 Period

#### 1. Background

23. In the September 20, 2005 Order, the Commission found that Dominion's tariff does not appear to preclude prior period adjustments to correct errors if the tariff has not been followed. Additionally, the Commission found Dominion's statement unclear as to the effective date of the correction to its methodology and required Dominion to clarify that point. The Commission also stated that, if the correction applied only to the period covered by its September 30, 2003 filing in this docket, Dominion must correct its rates and make appropriate credits back to November 1, 2001, the effective date of the Docket No. RP00-632-000 settlement.

#### 2. Compliance Filing and Comments

24. In the Compliance Filing, Dominion states that it does not believe that the September 20, 2005 Order requires it to change the effective TCRA rates, so it has not submitted tariff sheets with the Compliance Filing. According to Dominion, interim changes to the TCRA rates at this time would be administratively complex and inefficient, given the need for the Commission to act on this filing and Dominion's request for rehearing, as well as the fact that Dominion's current annual TCRA filing is pending before the Commission in Docket No. RP05-685-000 (2005 TCRA). However, in those instances where compliance necessitates, Dominion states that it will credit the applicable TCRA subaccounts to FERC Account No. 186, with the appropriate amounts where they will bear interest until reflected in rates (or reversed by subsequent decision). Dominion also states that it will file to adjust the rates in a future annual TCRA filing after the Commission acts on this filing and its request for rehearing in this proceeding, to the extent that the subsequent orders require such rate adjustment.

25. Dominion further states that it applied the changed methodology only for the period at issue in this proceeding, *i.e.*, July 1, 2002, through June 30, 2003. Dominion respectfully submits that the Commission lacks legal authority and failed to provide a reasoned basis for requiring any retroactive change in the approach previously approved for the period from November 1, 2001, through June 30, 2002, as discussed above. For purposes of the Compliance Filing, however, Dominion states that it has calculated that, during the period from November 1, 2001, through June 30, 2002, it confiscated 2,462 dekatherms (Dkt) of gas under its tariff, with a value of $7,362. Accordingly, to implement the directive in Paragraph 26 of the September 20, 2005 Order, Dominion states that it will credit an additional $7,362, with interest, to the section 15.5 adjustment in next year's annual TCRA filing or in a modification to the 2005 TCRA, if required.

26. In his comments in response to the Compliance Filing, Mr. Wilhelm contends that Dominion erroneously believes that it has no obligation to address issues prior to July

2002. He claims that, in its October 27, 2003 answer to his protest, Dominion acknowledged that its methodology was erroneous.

### 3. Commission Analysis

27. The Commission finds that Dominion has not complied with the September 20, 2005 Order. As discussed above, the only time limitation in Dominion's TCRA provisions is the provision relating to refunds for services after January 31, 2000. In the September 20, 2005 Order, the Commission directed Dominion to correct its rates and make appropriate credits, if necessary, back to November 1, 2001, the effective date of the Docket No. RP00-632-000 settlement. In the instant filing, Dominion appears to have ignored this directive, and does not offer a satisfactory explanation.

28. Further, the Commission affirms Mr. Wilhelm's observation that, in Dominion's October 27, 2003 answer to his protest, Dominion admitted that its methodology was erroneous and should have been changed, but in the Compliance Filing, Dominion erroneously asserts that it has no obligations to correct errors prior to July 2002. As the Commission concluded in section A. above, if there have been errors before or after July 2002, Dominion must correct them.

## C. Treatment of Tennessee/Capstone Costs in Docket No. RP02-565

### 1. Background

29. In the September 20, 2005 Order, the Commission directed Dominion to explain why it charged the TCRA with the full $19.8 million of annual costs instead of a reduced amount to reflect the fact that the Capstone facilities were in service only for eight months of the 12-month period covered by the TCRA filing. Alternatively, the Commission directed Dominion to recalculate its TCRA to reflect an appropriate reduced cost amount for that period and an additional adjustment to reflect the 50-percent cost-sharing requirement established in GT&C section 15.5.C.

### 2. Compliance Filing and Comments

30. In the Compliance Filing, Dominion states that the Docket No. RP00-15-000 settlement provided in part for it to seek certificate authority to construct facilities to replace capacity that it previously purchased from Tennessee Gas Pipeline Company

(Tennessee).[23] Dominion cites section 5.3.B of the Docket No. RP00-15-000 settlement, which provides as follows:

> If the Commission approves [Dominion's] certificate application for the Tennessee Replacement Project and [Dominion] constructs the facilities and places them in service, then: . . . .
>
> B. For purposes of calculating "Actual Transportation Costs" under Article IV of this Settlement, the combined annual cost of the Tennessee Replacement Project, including the cost of gas fuel and/or electric power attributable to the Tennessee Replacement Project, and the costs of any Tennessee market-area capacity that [Dominion] continues to purchase in order to meet an obligation that had been served using such capacity prior to the adoption of this Settlement shall be deemed to be $19.8 million. Moreover, to reflect gas fuel and/or electric power costs attributable to the Tennessee Replacement Project, CNG will remove $3.0 million per year from its FAP as part of each annual TCRA filing during the TCRA Settlement Period commencing with the month of the in-service date of the Tennessee Replacement Project.[24]

31. According to Dominion, at the time of the Docket No. RP00-15-000 settlement, the anticipated in-service date for the Capstone facilities was known to be November 1, 2001. However, Dominion asserts that the settlement did not provide for a pro-rated TCRA period with actual costs for part of a year and the negotiated amount for the remainder of the year after the in-service date. Dominion maintains that, if the parties had intended a pro-ration of actual costs and the settlement allowance for Tennessee/Capstone of $19.8 million, similar language to that used in the very next sentence of the settlement would have been included. Specifically, Dominion points out that the next sentence of the Docket No. RP00-15-000 settlement provides that the related removal from the fuel tracker of $3 million would begin "with the month of the in-service date of the Tennessee Replacement Project." In addition, continues Dominion, such an approach would have been contrary to the parties' establishment of a benchmark cost allowance that placed Dominion at risk for differences between the actual costs and the negotiated amount, whether positive or negative. Moreover, knowing that the Capstone facilities would be in place for the winter, Dominion states that it was able to avoid costs earlier in 2001 that otherwise would have been incurred to secure the Tennessee services

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[23] *See CNG Transmission Corp.*, 89 FERC ¶ 61,304 (1999) (order approving contested settlement). Dominion states that the construction project was referred to in the settlement as the "Tennessee Replacement Project" and later was dubbed the Capstone Project.

[24] *See* Dominion Transmission, Inc., Docket No. RP03-623 Transportation Cost Rate Adjustment Compliance Filing at 3 (October 11, 2005).

that were to be replaced, allowing Dominion to obtain the benefit of the bargain it negotiated as part of the Docket No. RP00-15-000 settlement and rendering any potential use of pre-Capstone actual costs for the year deceptive.

32. Finally, Dominion states that all parties and the Commission accepted this methodology when this issue was before the Commission in Docket No. RP02-565 (2002 TCRA). Dominion further states that, in its filing in Docket No. RP01-626 (2001 TCRA), which was made before the in-service date of the Capstone facilities, two of the parties focused closely on the interrelationship of section 5.3.B of the Docket No. RP00-15-000 settlement and the in-service date of the Capstone facilities. Dominion states that, in its 2001 TCRA, it proposed to reflect the $3 million fuel credit in its deferred account, with interest, so that it would be reflected in rates in the 2002 TCRA. However, continues Dominion, customers argued that the credit should have been reflected in the 2001 TCRA consistent with the November 1, 2001 increase in the transportation fuel retention rate with the application of the Capstone Adder, and Dominion acceded to their wishes.[25] In contrast, Dominion asserts, when it utilized the settlement negotiated amount of $19.8 million for Tennessee/Capstone costs in its 2002 TCRA, no party questioned that approach, and the Commission accepted it.[26]

33. Given this history, Dominion argues that the Commission has no legal authority and has not presented a rational basis to now require a different approach to the Capstone costs during the 2002 TCRA period. For purposes of the Compliance Filing, Dominion merely submits that its application of the settlement provision was correct and accepted by all the parties to the settlement, and the Commission should not require a change in approach at this time.

34. In his comments in response to the Compliance Filing, Mr. Wilhelm contends that Dominion improperly claims that, even though the Capstone facilities were not in service during the entire TCRA period, Dominion had the right to charge the TCRA $19.8 million for the period from July 2001 through June 2002. According to Mr. Wilhelm, Dominion's erroneous logic is contradicted by its own actions on other provisions of the

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[25] Dominion cites *Dominion Transmission, Inc.*, 97 FERC ¶ 61,071 (2001). *See also* Joint and Several Motion to Intervene of Niagara Mohawk Power Corporation, National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, and Rochester Gas and Electric Corporation and Request for Order Directing Compliance Filing at 4-5, Docket No. RP01-626 (October 10, 2001); Motion to Intervene and Comments of The East Ohio Gas Company d/b/a Dominion East Ohio, The Peoples Natural Gas Company d/b/a Dominion Hope at 3-4, Docket No. RP01-626 (October 10, 2001).

[26] Dominion cites Letter Order, Docket No. RP02-565 (October 30, 2002).

applicable settlement. He maintains that section 4.1.A of that settlement provided for two levels of Current Transportation Costs -- $38.5 million annually through October 31, 2001, and $37.5 million annually beginning November 1, 2001. Mr. Wilhelm states that, in the Docket No. RP02-565 filing on Workpaper 7, Page 1, Line 11, Dominion was required to list the TCRA Settlement Transportation Costs.

35. Mr. Wilhelm maintains that Dominion utilized an amount of $37.8 million, and it utilized a pro-rated amount based on the number of months that the Current Transportation Costs were relevant, *i.e.*, July-October at the higher amount and November-June at the lower amount. Mr. Wilhelm contends that the Commission should recognize that the settlement did not provide such a monthly pro-ration; Dominion correctly understood that an annual amount is equal to12 equal monthly amounts. Thus, continues Mr. Wilhelm, on this workpaper, Dominion interpreted the settlement two different ways. He also observes that Dominion has yet to provide the true amount in question on this issue. He asserts that, while Dominion has indicated the amounts in question for most other issues in its Compliance Filing, it is notably silent on an issue that would provide all Dominion customers rate relief of approximately $2 million. Also, continues Mr. Wilhelm, the Commission should ask Dominion for accounting records supporting its assertion that the settlement provided this windfall benefit.

### 3. Commission Analysis of Compliance Issues

36. The Commission finds that Dominion has satisfactorily complied with the September 20, 2005 Order. In that order, the Commission directed Dominion to explain why it charged the TCRA with the full $19.8 million of annual costs instead of a prorated amount, and in the instant filing, Dominion has explained that the Docket No. RP00-15-000 settlement stipulated the amount of $19.8 million, but did not provide for proration of this amount.

37. Mr. Wilhelm points out that other provisions of the Docket No. RP00-15-000 settlement provide for proration. However, the Commission disagrees with his claim that proration also should apply to the Tennessee/Capstone costs. The fact that the settlement is quite explicit about proration in one provision and silent about proration in another does not mean proration of costs was intended to apply to costs discussed in all sections of the settlement. Mr. Wilhelm asserts that Dominion has interpreted the settlement in two different ways, but again the Commission disagrees. The Commission finds that Dominion has treated the Tennessee/Capstone costs and the Current Transportation Costs correctly in accordance with the provisions of the applicable settlement. Thus, the Commission accepts Dominion's Compliance Filing insofar as it addresses this issue.

### 4. Rehearing

38. In its request for rehearing of the September 20, 2005 Order, Dominion argues that the Commission lacks authority to require it to change its ruling in Docket No. RP02-565-000 regarding the Tennessee/Capstone costs. Because the Commission has determined that Dominion treated those costs properly, it need not address the question of whether it has authority to change the ruling in Docket No. RP02-565-000. Therefore, its request for rehearing is denied as moot.

## D. Treatment of Confiscated Gas under Dominion's Superseded Tariff

### 1. Background

39. In his request for rehearing of the October 31, 2003 Order, Mr. Wilhelm contended that the Commission erred in accepting Dominion's inclusion of confiscated gas amounts as Actual Transportation Costs. The result, he observed was that only 50 percent of the amounts were credited to the shippers' Unrecovered Transportation Cost Surcharge pursuant to the revenue sharing feature of the Settlement and tariff. He claimed that Dominion had acknowledged that it filed to retain amounts that should have been credited to the TCRA. He contended that Dominion has no basis for crediting the value of the confiscated gas to Actual Transportation Costs; rather, he argued, GT&C section 15.5.F requires the entire amount to be returned to customers as an adjustment to Dominion's Unrecovered Transportation Cost Surcharge. Further, Mr. Wilhelm argued that Dominion had listed monthly quantities of confiscated gas with no reconciliation to its Electronic Bulletin Board (EBB) postings, and he asked the Commission to require Dominion to reconcile Workpaper 7 with its EBB postings.

40. In the September 20, 2005 Order, the Commission clarified that there was no inherent discrepancy between the information posted on Dominion's EBB and its confiscated gas figures. However, to ensure transparency, the Commission directed Dominion to provide actual confiscated amounts by month, to list such amounts separately on its EBB, and to record them in a separate account. The Commission also directed Dominion to explain why the value of confiscated gas is credited to Actual Transportation Costs or to correct its rates to reflect the appropriate crediting. The Commission found no tariff basis for Dominion's treatment of confiscated gas crediting and stated that, consistent with Mr. Wilhelm's assertion, it appears that GT&C section 15.5.F requires this amount to be returned to Dominion's customers as an adjustment to the Unrecovered Transportation Cost Surcharge.

### 2. Compliance Filing and Comments

41. In the Compliance Filing, Dominion states that it responded to Mr. Wilhelm's original protest by indicating that gas confiscated during the 2003 TCRA period pursuant

to its tariff had been reflected as a reduction in the gas used for fuel. Dominion further states that it agreed with Mr. Wilhelm's assertion that the value of the confiscated gas instead should have been credited to the TCRA pursuant to the Docket No. RP00-632-000 settlement. According to Dominion, it implemented that change by crediting $14,846 to Actual Transportation Costs as required by the language contained in GT&C section 29.2 at that time, which addressed Confiscated Gas and which stated in part that Dominion shall "credit the value of the gas in accordance with section 15.5.B," which defines Actual Transportation Costs. Further, Dominion argues that, under the operation of the settlement, if Actual Transportation Costs are less than Current Transportation Costs, half of the difference between the amounts flows through to Dominion's customers as the "section 15.5 Adjustment" in Dominion's TCRA filings.[27]

42. Dominion asserts that it later explained the basis for its methodology in a separate proceeding in Docket No. RP04-105, in which it identified and clarified a tariff inconsistency relating to the crediting of confiscated gas by changing the cross-reference in GT&C section 29.2 from section 15.5.B to section 15.5.F, which provides that all revenue credits shall be returned to customers as an adjustment to Dominion's Unrecovered Transportation Cost Surcharge, effective January 7, 2004.[28] Dominion states that it agreed in that filing that the tariff should be modified to clarify that confiscated gas amounts would be returned to customers as an adjustment to the Unrecovered Transportation Cost Surcharge. According to Dominion, the Commission approved the tariff revision, pending the outcome of the 2003 TCRA proceeding. Thus, Dominion claims that, when it subsequently filed its answer in the 2003 TCRA proceeding, it credited the confiscated gas based on the then-effective GT&C section 29.2, which referenced section 15.5.B, thereby requiring revenues from confiscated gas to be credited to the Actual Transportation Cost component of the TCRA under section 15.5.B, with the consequent 50-percent allocation procedure.

43. Dominion claims that its approach in this proceeding simply followed the tariff requirement in effect at the relevant time. Dominion explains that, had the credit been applied based on GT&C section 15.5.F instead of section 15.5.B, an additional $7,423 would have been credited to the 2003 TCRA. Further, Dominion states that, because the Commission conditioned its acceptance of Dominion's proposed change to GT&C section 29.2 on the outcome of the 2003 TCRA proceeding, Dominion's current tariff continues to reflect the earlier cross-reference of section 15.5.B. However, Dominion emphasizes that, in both the 2004 and 2005 TCRAs, it credited the entire amounts associated with confiscated gas to the section 15.5 Adjustment, anticipating that the Commission's ultimate ruling on the 2003 TCRA will resolve the issue.

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[27] *See* GT&C section 15.5.C.

[28] Dominion cites *Dominion Transmission, Inc.*, 106 FERC ¶ 61,007 (2004).

44. Finally, Dominion states that, in the September 20, 2005 Order, the Commission also required Dominion (1) to list confiscated gas volumes separately on its EBB and record them in a separate account and (2) to provide the actual confiscated gas amounts by month. Dominion states that it currently posts unauthorized gas by month on its EBB's Informational Postings under the heading "Notices – NonCritical." However, Dominion states that, in the future, it will also indicate what unauthorized gas volumes have been confiscated. According to Dominion, it currently records confiscated gas volumes in a separate account, and will continue to do so. Dominion states that it has provided the actual monthly confiscated gas amounts in each of the past three TCRA periods[29] and will continue to provide similar information in future TCRA filings.[30]

45. In his comments in response to the Compliance Filing, Mr. Wilhelm contends that GT&C section 15.5.B makes reference to three types of costs which can be considered Actual Transportation Costs, none of which is confiscated gas. Further, he states that sections 15.5.C and 15.5.D adjust the surcharge to be collected to reflect the sharing provisions of the settlement. According to Mr. Wilhelm, once this calculation is done, section 15.5.F. governs the inclusion of all credits for items including confiscated gas.

### 3. Commission Analysis of Compliance Issues

46. The Commission accepts this aspect of Dominion's Compliance Filing. Mr. Wilhelm argues that GT&C section 15.5.B refers to three types of costs which can be considered Actual Transportation Costs, and that none of these is "confiscated gas." GT&C section 15.5.B states in part:

> Pipeline will calculate the difference between "Actual Transportation Costs" and "Current Transportation Costs." "Actual Transportation Costs" shall include: [i] all costs of transactions identified in General Terms and Conditions section 15.7 or successor transactions; [ii] reduced by any refunds of Account No. 858 costs received for services rendered after January 31, 2000 consistent with the cost responsibility of DTI and its customers during the refund period; and [iii] further reduced by revenues received as a result of Account No. 858 transportation capacity released.

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[29] *See* Workpaper 7, Page 2 of 2 in Docket No. RP03-623-00 filed October 27, 2003; Workpaper 3, Page 2 of 2 in Docket No. RP04-618-000 filed September 30, 2004; Workpaper 3, Page 2 of 5 in Docket No. RP05-685-000 filed September 30, 2005.

[30] Dominion states that a copy of the actual confiscated gas amounts by month for the 2003 TCRA period is provided in Attachment A to the Compliance Filing.

47. Mr. Wilhelm is correct in his observation that this section does not refer to "confiscated gas." Nevertheless, the Commission finds that, although not a model of clarity, Dominion's tariff in effect at the time it made its correction did require Dominion to credit the confiscated gas amounts to its "Actual transportation Costs" as defined in section 15.5.B for purposes of determining the amount of revenue sharing under section 15.5.C of the tariff. The fact that this resulted in the Unrecovered Transportation Cost Surcharge being adjusted only for one-half of the amount was simply how the tariff operated at the time. The fact that the tariff was later changed to provide for treatment more representative of the settlement parties' intent does not warrant retroactive application of that revised provision. Moreover, the Commission is satisfied that the figures set forth in Attachment A of Dominion's Compliance Filing accurately track the volumes of confiscated gas month by month for the 2003 TCRA period. Accordingly, the Commission accepts Dominion's explanations regarding its treatment of confiscated gas and finds that Dominion has acted in a manner that is consistent with its tariff and earlier Commission orders.

### 4. <u>Rehearing</u>

48. In its request for rehearing of the September 20, 2005 Order, Dominion states that the Commission raised two issues with respect to its treatment of confiscated gas. First, Dominion states that the Commission ordered it to implement the crediting approach back to the effective date of the RP00-632 settlement, which is November 1, 2001.[31] However, Dominion argues that this retroactive correction is not the sort of "out of period" adjustment contemplated by Dominion's tariff because it was not an adjustment "received by Pipeline [and], applicable to services performed for Pipeline." Dominion contends that this sort of change is barred by the rule against retroactive ratemaking and amounts to an impermissible retroactive remedy imposed under NGA section 5. The Commission has addressed above its authority to order past period adjustments where circumstances warrant; however, Dominion has satisfactorily met its obligations and credited the value of confiscated gas where appropriate under its tariff requirements.

49. Additionally, in its request for rehearing, Dominion contends that the September 20, 2005 Order raises a second issue concerning treatment of confiscated gas. According to Dominion, that question is whether the amounts associated with confiscated gas should be credited not to Actual Transportation Costs, but rather "shall be returned to customers as an adjustment to the Pipeline's Unrecovered Transportation Cost Surcharge" pursuant to GT&C section 15.5.F. Dominion states that the September 20, 2005 Order allowed it to explain its approach to this issue, and Dominion urges the Commission to accept the explanation offered in the Compliance Filing and require no

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[31] Dominion cites *Dominion Transmission, Inc.*, 112 FERC ¶ 61,321 at P 26 (2005).

change. Dominion states that the alternative proposed by the Commission is for Dominion to make the change retroactive back to November 1, 2001.

50. The Commission finds that Dominion's Compliance Filing provides a satisfactory explanation concerning its treatment of confiscated gas. Thus, the Commission need not address whether it can order adjustments relating to confiscated gas retroactively to November 1, 2001. Therefore, rehearing is denied as moot.

## E. Calculation of Interest under the Docket No. RP00-15-000 Settlement

### 1. Background

51. In his request for rehearing of the October 31, 2003 Order, Mr. Wilhelm contended that the Commission erred in accepting Dominion's interest calculation, which was based on the full $37.5 million in stipulated annual Current Transportation Costs, as set forth in GT&C section 15.3.A, without reduction for unpaid accruals. Dominion responded that the Docket No. RP00-15-000 settlement established that Current Transportation Costs would be $37.5 million regardless of actual costs incurred. Dominion also explained that it applied the Commission carrying charge rate. Further, Dominion stated that it had identified Actual Transportation Costs to implement the shared savings aspect of the Docket No. RP00-15-000 settlement.

52. Mr. Wilhelm also asserted that the GT&C specified that interest would be at the prevailing Commission interest rate times the carrying charge base and that unpaid accruals must be excluded prior to calculating interest. He agreed that the Docket No. RP00-15-000 settlement established $37.5 million as the Current Transportation Costs, regardless of actual costs incurred; however, he maintained that Dominion was incorrect in asserting that this amount was the correct carrying charge base for interest calculation. Mr. Wilhelm argued that GT&C section 33.2.A provides that the carrying charge base must be reduced for unpaid accruals. Mr. Wilhelm asked the Commission to require Dominion to state its actual monthly TCRA costs for all relevant periods so that it can calculate the carrying charge base and interest correctly.

53. In the September 20, 2005 Order, the Commission granted rehearing, quoting GT&C section 33.2A as follows: "The carrying charge base for the refund, revenue credits, and billing adjustments subaccount will be the prior month's ending refund, revenue credit, and billing adjustment subaccount balance of Account No. 186, adjusted for any applicable deferred income taxes recorded and reduced for any unpaid accruals."[32] The Commission directed Dominion either to (1) credit the $37.5 million in Current Transportation Costs for any unpaid accruals, beginning with the period covered by the Docket No. RP00-15-000 settlement, and to adjust its interest calculations for

[32] *Id*. at P 41.

actual TCRA monthly costs accordingly; or (2) provide a thorough explanation of its methodology if it believes it should not make these adjustments and how its accounting methodology has been consistent with its tariff, the Docket No. RP00-15-000 settlement, and any subsequent settlements and Commission orders.

### 2. Compliance Filing and Comments

54. In the Compliance Filing, Dominion states that section 4.1 of the Docket No. RP00-15-000 settlement provides that "For the period November 1, 2001 through the TCRA Settlement Period, the level of Current Transportation Costs, as defined in GT&C section 15, shall equal $37,484,997 per year in total." Dominion further states that section 15.4 of the GT&C provides as follows:

> Each month the Transportation Cost sub-account of Account No. 186 shall be debited (in the event of a debit balance) or credited (in the event of a credit balance) with interest on the prior month's ending balance calculated by utilizing the procedures set forth in section 33 of the General Terms and Conditions.

55. Dominion maintains that its accounting methodology is consistent with the Docket No. RP00-15-000 settlement, which established that the amount Dominion actually spends is irrelevant to the calculation of Current Transportation Costs. Dominion explains that the settlement is premised on the hypothetical supposition (intended as an incentive) that it spends an annual amount of $37.5 million for Current Transportation Costs, regardless of the amounts actually incurred, with interest calculated based on that same assumption. According to Dominion, the amounts it actually pays become relevant only for the subsequent comparison of the actual costs to the settlement amount for purposes of calculating the cost savings sharing.

56. Dominion argues that Mr. Wilhelm incorrectly proposes to treat the Current Transportation Costs as if they were dependent upon actual costs incurred by Dominion, which would be correct if it were not for the Docket No. RP00-15-000 settlement. Dominion asserts that, under that settlement, if Mr. Wilhelm's approach were to be adopted, Dominion would be required to quantify the ongoing costs incurred in relation to the Tennessee/Capstone Project, which the settlement established as part of the TCRA costs. Given the complicated nature of such a requirement and if such an approach were intended by the parties, Dominion claims that detailed provisions regarding the methodology would have been included in the settlement. However, Dominion states that no such provisions are included in the settlement because the parties agreed that the amount of Current Transportation Costs is $37.5 million. Therefore, Dominion states that Actual Transportation Costs are relevant only for the purpose of calculation of GT&C section 15.5.C. Dominion emphasizes that it cannot recover actual costs in excess of $37.5 million and is not permitted to recover any interest on such excess costs.

57. Dominion further explains that unpaid accruals represent expenses recorded on a company's books for which it has not satisfied the obligation in cash. According to Dominion, in the normal course, the company would expect to pay this obligation in cash in the future; however, this concept simply does not apply to the difference between the transportation costs of $37.5 million established by the settlement and the costs actually incurred by Dominion. Thus, continues Dominion, there are no unpaid accruals as contemplated by GT&C section 33. Dominion also states that it has calculated interest in the same way -- without determining an unpaid accrual portion of the negotiated settlement amount of Current Transportation Costs -- in each of its TCRA filings since the effective date of the Docket No. RP00-15-000 settlement on February 1, 2000. Dominion points out that the Commission has accepted that approach in acting on each of those filings, and until this proceeding, no party has ever challenged or questioned this approach and, even here, the approach is not challenged by any party to the settlement. Finally, Dominion states that, for purposes of this Compliance Filing, the approach it has followed is consistent with the settlement and Commission orders and should be upheld once again.

58. Mr. Wilhelm responds to the Compliance Filing by stating that Dominion contradicts its own arguments on this issue. He states that, with respect to Tennessee/Capstone issue, Dominion claims that the words of the settlement are plain and free of ambiguity, while on this issue, Dominion asserts that the settlement is premised on a hypothetical supposition that Dominion spends an annual amount of $37.5 million. Mr. Wilhelm argues that the settlement provides for Dominion to share cost savings below the $37.5 million ceiling, while Dominion implies that it could collect interest on the entire amount even if it spent nothing.

### 3. Commission Analysis of Compliance Issues

59. The Commission finds that Dominion has failed to show why it should not apply the requirement of section 33.2 to deduct unpaid accruals from the stipulated $37.5 million balance[33] in Current Transportation Costs as required by section 15.4.E of the GT&C of its tariff. While Dominion presents arguments suggesting that the exiting tariff provisions are inequitable or inconsistent with the TCRA methodology established by the settlements, Dominion does not address how the existing tariff, which was the product of those settlements, can be interpreted to not require the deduction of unpaid accruals from

[33] The actual amount is $37,484,997. Certain details of the Docket No. RP00-15 settlement have been made a part of Dominion's FERC Gas Tariff. For example, GT&C section 15.3 specifies "Current Transportation Costs shall equal $37,484,997 per year in total (allocated $3,658,453 to Storage Demand, $196,837 to GSS TE service, $24,343,995 to Transportation Reservation and $9,285,712 to Transportation Usage)."

the balance of the Unrecovered Transportation Cost subaccount of Account No. 186 in calculating interest.

60. GT&C section 15.4.D states:

> Each month the Transportation Cost sub-account of Account No. 186 shall be debited (in the event of a debit balance) or credited (in the event of a credit balance) with *interest on the prior month's ending balance calculated by utilizing the procedures set forth in section 33 of the General Terms and Conditions*. (emphasis added)

61. GT&C section 33.2.A, in turn, states:

> *The carrying charge base* for the refund, revenue credits, and billing adjustments subaccount *will be* the prior month's ending refund, revenue credit, and billing adjustment subaccount *balance of Account No. 186*, adjusted for any applicable deferred income taxes recorded and *reduced for any unpaid accruals*. The carrying charge base for any other subaccount of Account No. 186 will be the prior month's ending balance: (i) *reduced for unpaid accruals*; (ii) adjusted for any applicable deferred income taxes; and (iii) increased or decreased for exchange transactions and transportation imbalance cost adjustments; and (iv) adjusted for the difference, if any, between the rate used for storage gas, and the rate that would be effective for storage gas if a rolling weighted average inventory costing methodology had been used. (emphasis added)

62. Accordingly, these provisions require the deduction of unpaid accruals from the balance of the Unrecovered Transportation Cost subaccount of Account No. 186 in calculating interest. Dominion is directed to file revised TCRA rates and supporting workpapers to reflect the deduction from the balance of the Unrecovered Transportation Cost subaccount of Account No. 186 for any unpaid accruals, beginning with the period covered by the Docket No. RP00-15-000 settlement, and to adjust its interest calculations for actual TCRA monthly costs accordingly.

63. Further, Dominion has not yet demonstrated how it has applied GT&C sections 15 and 33 of its tariff to the calculation of its TCRA. More specifically, Dominion has not yet provided a satisfactory explanation as to how, on a monthly basis, the difference between the Current Transportation Costs and the Actual Transportation Costs has been calculated, and how any interest, if applicable, has been calculated on the balance that is carried over from month to month. Dominion is directed to provide its monthly computations of the differences between the Current Transportation Costs and its Actual Transportation Costs for the period covered by the 2003 TCRA. Dominion is also

directed to demonstrate how it has adjusted its monthly Actual Transportation Costs for unpaid accruals, as required by section 33.2.A of its tariff.

### 4. Rehearing

64. In its request for rehearing of the September 20, 2005 Order, Dominion states that it explained in its Compliance Filing the reasons why its accounting methodology is just and reasonable. Dominion urges the Commission to accept its explanation and not require any change here. Dominion argues that, in a series of previous orders, the Commission has accepted its approach for calculating interest and cannot now require a retroactive change in the tariff. As noted above, the Commission is correctly applying the existing tariff and is not, as Dominion claims, retroactively changing its tariff. Further, as the Commission determined above, it has the authority to require Dominion to make corrections to its TCRA for prior periods. Accordingly, rehearing is denied with respect to this issue. If Dominion believes that the tariff inappropriately calculates interest, it may file a tariff change proposal that the Commission will review.

## F. Collection of TCRA Amounts from Volumetric Negotiated Rates

### 1. Background

65. In his request for rehearing of the October 31, 2003 Order, Mr. Wilhelm contended that the Commission erred in allowing Dominion to understate the collection of TCRA amounts from volumetric negotiated rates. He asserted that Dominion had indicated that it treated all volumetric negotiated rates like any other usage rate to determine TCRA recovery amounts. According to Mr. Wilhelm, Dominion’s authority to charge negotiated rates was established in Docket No. RP96-383-000, and the Commission stated in that proceeding that, when a pipeline sought to use its authority to negotiate rates, the Commission required assurance that shippers taking service under the existing forms of rates would not be harmed. Mr. Wilhelm asserted that Dominion’s recourse rates are based on an SFV rate design, under which the vast majority of the TCRA costs are recovered via reservation rates; however, he stated that shippers using volumetric negotiated rates do not pay such reservation rates despite having equivalent firm rights to use Dominion’s system.

66. Mr. Wilhelm contended that, for Dominion to comply with the “no harm” mandate, it must recover more than just usage-based TCRA costs. He argued that Dominion has the ability to calculate the “no harm” collection amount quite easily because Sheet No. 32 of its tariff includes the volumetric equivalent of its Rate Schedule FT reservation rate. Mr. Wilhelm contended that the sum of this rate and the usage charge yields the 100-percent load factor rate and that use of the 100-percent load factor rate would provide the required protection.

67. Moreover, continued Mr. Wilhelm, this issue can be explained by reference to Sheet No. 1406 of Dominion's GT&C. He explained that, during the period from November 2002 through March 2003, a shipper paid Dominion $0.40 per Dth for all transportation, with a minimum throughput of 420,000 Dth. However, he stated, based on Dominion's revised approach and assuming the minimum throughput level, Dominion credited only a small portion of the collected amount to the TCRA. In Mr. Wilhelm's view, using only the usage rate to determine TCRA revenues creates a shifting of costs to the recourse rate customers, which is inconsistent with the Commission's policy on negotiated rates. Thus, Mr. Wilhelm asked the Commission to require Dominion to recalculate the TCRA revenues for volumetric negotiated rates for all relevant periods, not just for the period from July 2002 through June 2003.

68. In the September 20, 2005 Order, the Commission directed Dominion either to make the corrections requested by Mr. Wilhelm and to provide supporting calculations or workpapers or to provide a more complete explanation of and support for its adjustment to the TCRA for volumetric negotiated rate revenues, as well as to demonstrate how its adjustment is consistent with applicable settlements, its tariff, and Commission orders. The Commission particularly emphasized that Dominion must show that no shipper is harmed by this methodology.

### 2. Compliance Filing, Protest, and Comments

69. In the Compliance Filing, Dominion states that GT&C section 15.4.A provides in part that the Unrecovered Transportation Cost Account should be credited (reduced) by revenues Dominion receives attributable to the Transportation Cost reflected in Dominion's rates, *i.e.*, the TCRA reservation and usage surcharges.[34] According to Dominion, its tariff requires it to credit to the TCRA only amounts actually collected through the application of the TCRA reservation and usage surcharges. For volumetric negotiated rate agreements, Dominion states that it does not collect any reservation charge and, by the same token, does not collect any TCRA reservation surcharge. Dominion maintains that it has no right to begin collecting a TCRA reservation surcharge from the volumetric negotiated rate customers. Therefore, asserts Dominion, the requirement advocated by Mr. Wilhelm, and considered by the Commission, is for Dominion to reduce the revenue that it had negotiated to receive from the customers on a volumetric basis to credit additional amounts to customers as if it were receiving the TCRA reservation surcharge. However, Dominion argues that this approach is contrary to its tariff and has not been legally justified.

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[34] Dominion cites *Dominion Transmission, Inc.*, 112 FERC ¶ 61,321 at P 43 (2005).

70. In its Compliance Filing, Dominion states that its tariff requires it to credit to the TCRA only amounts actually collected through the application of the TCRA reservation and usage surcharges. For volumetric negotiated rate agreements, Dominion does not collect any reservation charge and, by the same token, does not collect any TCRA reservation surcharge. Moreover, argues Dominion, nothing in the tariff requires it to attribute the collection of a TCRA reservation surcharge to volumetric negotiated rate customers not actually paying that surcharge. Furthermore, Dominion claims that each of the negotiated rate agreements providing volumetric rates was disclosed and expressly approved or accepted by the Commission, with no requirement as to the TCRA treatment.

71. Moreover, Dominion contends that its customers are not harmed by its approach because it does not incur additional TCRA costs as a result of adding a new negotiated rate customer. According to Dominion, the costs to be recovered do not change, so any TCRA recovery from the new customer (even if only the usage component) contributes to the total cost recovery and reduces the amount that must be paid by the other customers.

72. Dominion maintains that, if any customer objected to a particular negotiated rate agreement that did not provide for recovery of the TCRA reservation surcharge -- which is the case with any volumetric agreement by definition -- it could and would have raised the issue in the proceeding in which Dominion filed for and received approval of the negotiated rate agreement. Dominion explains that customers have, for instance, challenged the workings of Dominion's fuel tracker for certain negotiated rate agreements, and they could have done the same with respect to the workings of the TCRA.[35] Yet, Dominion emphasizes that no customer ever raised the issue of the application of the TCRA to volumetric negotiated rate agreements in any of the proceedings concerning those agreements.

73. In his response to the Compliance Filing, Mr. Wilhelm states that Dominion's authority to charge negotiated rates was established in Docket No. RP96-383. He cites the Commission's September 30, 1997 Order in that docket in which the Commission stated that it required assurance that other shippers would not be harmed by the use of negotiated rates.[36] He again points out that Dominion's recourse rates are based on an SFV rate design, under which most TCRA costs are recovered via reservation rates. By definition, he continues, shippers using volumetric negotiated rates pay no such reservation rate despite having equivalent firm rights to use the pipeline system. In other words, explains Mr. Wilhelm, if all but one of Dominion's firm transportation shippers currently paying both reservation and usage rates converted to negotiated rates, that one shipper would be responsible for all of Dominion's FT reservation-based costs.

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[35] Dominion cites, *e.g., Dominion Transmission, Inc.*, 108 FERC ¶ 61,106 (2004).

[36] *CNG Transmission Corp.*, 80 FERC ¶ 61,401 (1997).

74. Mr. Wilhelm states that Dominion alleges that no customers are harmed because it does not incur additional TCRA costs as the result of adding a new negotiated rate shipper. However, continues Mr. Wilhelm, the negotiated rate found on Sixth Revised Sheet No. 1402 creates several questions. For example, Mr. Wilhelm states that, using Contract No. 200223 with Rochester Gas & Electric, which is not a new customer because the negotiated rate began in June 2000, the MDTQ on this contract is 12,100, and this is the quantity used in the design of the FT Reservation TCRA rate. Mr. Wilhelm maintains that Dominion believes it should design rates using these quantities, but it should not recover any costs for them.

75. Finally, Mr. Wilhelm states that, from a review of prior TCRAs, Dominion appears to have collected more than just usage-based TCRA costs from negotiated rate shippers. Mr. Wilhelm states that, in this proceeding, Dominion acknowledges using a "total contract demand approach" that it subsequently changed for no tariff-related reason. He also states that Workpaper 8, Page 2 of Docket No. RP02-565 contains usage recoveries valued at $0.0657/Dt and $0.0840/Dt. Mr. Wilhelm asserts that these recoveries, at rates too high to be usage-based only, appear to be negotiated rates. He asks the Commission to require Dominion to confirm how it has treated negotiated rates in the past.

76. Protesters argue that Dominion should be required to impute billing determinants based on negotiated rate customers' transportation and that to do otherwise would harm recourse rate shippers by forcing them to cross-subsidize negotiated rate customers. According to Protesters, the Commission addressed a similar issue in Docket No. CP03-41, in which Dominion filed an application to lease, own, operate, and maintain various facilities to provide service to five Mid-Atlantic customers. Protesters observe that National Fuel expressed concern in that proceeding that system shippers should not be forced to subsidize summer-period incremental rate discounts based in part on a 100-percent discount of Dominion's TCRA and Electric Power Cost Adjustment (EPCA) rates. Protesters assert that National Fuel argued that a subsidy would occur if Dominion were allowed to zero out summer-period determinants when it is allocating its TCRA and EPCA costs across its adjusted billing determinants. According to Protesters, to prevent such a subsidy, National Fuel asked that Dominion be required to impute associated billing determinants during the course of the discounted rate agreement when Dominion makes its annual TCRA and EPCA tracker filings.

77. Protesters further assert that the Commission determined in that proceeding that the relevant agreement did not distinguish whether TCRA and EPCA charges are attributable to primary or secondary points, so it found the agreement inconsistent with Dominion's tariff and Commission regulations for discounted rates. Accordingly, Protesters state that the Commission required Dominion to charge TCRA and EPCA charges during the summer period, or, in the alternative, Dominion could file a negotiated rate agreement. However, Protesters emphasize that the Commission provided that, if

Dominion selected the negotiated rates agreement option, it would be required to impute billing determinates based on the negotiated rate customer's summer period secondary point transportation when Dominion makes its annual TCRA and EPCA filings.[37] Likewise, Protesters claim that, in the current proceeding, Dominion should be required to impute billing determinates associated with all of its negotiated rate agreements, including volumetric and lump sum, because to do otherwise would harm shippers by forcing them to cross-subsidize Dominion's negotiated rate customers.

### 3. <u>Commission Analysis of Compliance Issues</u>

78. The Commission finds that Dominion's position has no merit. Mr. Wilhelm and Protesters have correctly stated the Commission's policy on this issue and nothing in the tariff supports Dominion's position that only amounts collected as reservation charge surcharges may be deemed to be TCRA cost recoveries. Further, in reviewing the various settlements that have shaped Dominion's TCRA mechanism over the last several years,[38] the Commission finds numerous references to Dominion's customers, but none of these references limits the effects or obligations associated with the TCRA to recourse customers or to customers who pay some specified level of TCRA Unrecovered Transportation Cost reservation charge surcharges. Nothing in these various settlements exempts customers who pay negotiated volumetric rates from the obligations of the various TCRA settlements. The Commission finds that, as revenues have been collected from Dominion's customers and credited to the TCRA, Dominion's customers who pay reservation rates have been subsidizing those customers who pay negotiated volumetric rates. There is no question that customers who pay TCRA surcharges have been harmed, and Dominion must correct this consistent with its tariff and settlements.

79. In *Natural Gas Pipeline Company of America* (*Natural*),[39] the Commission directed that surcharges that recover 100 percent of Order No. 636 transition costs should be treated as the last items of the overall reservation charge that are discounted. Under that method, the pipeline must discount all the way through its base rates before discounting transition costs. The Commission noted that it recognized that discount adjustments are highly complex and, thus, ill-suited to periodic tracking filings. The Commission further noted that it had also stated that its policy is designed in part to

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[37] Protesters cite *Dominion Transmission, Inc. and Texas Eastern Transmission, LP*, 104 FERC ¶ 61,267 (2003).

[38] *CNG Transmission Corp.*, 89 FERC ¶ 61,261 (1998) (Docket No. RP97-406); *CNG Transmission Corp.*, 89 FERC ¶ 61,304 (1999) (Docket No. RP00-15); *Dominion Transmission, Inc.*, 95 FERC ¶ 61,316 (2001) (Order No. 637 Settlement); *Dominion Transmission, Inc.*, 96 FERC ¶ 61,288 (2001) (Docket No. RP00-632).

[39] 69 FERC ¶ 61,029 at 61,117 (1994).

minimize discount adjustments in periodic filings and that this will allow discount-related issues to be addressed primarily in the rate case.

80. In *Columbia Gas Transmission Corporation* (*Columbia Gas*),[40] the Commission asserted that, when it permits a pipeline to implement a separate surcharge to track changes in a particular cost item through periodic filings between general section 4 rate cases and to true-up under and over-recoveries of the cost in question, the pipeline is effectively permitted an exception from the Commission's general discount policy. The Commission stated that this was because truing-up under-recoveries of the tracked cost allows the pipeline to recoup the cost of any past discounts of the surcharge from its other customers. In other words, the true-up mechanism automatically shifts the costs of any discounts of the surcharge to the pipeline's non-discounted customers. In *Natural,* the Commission sought to minimize any such automatic costs shifts in the context of the periodic trackers through which pipelines were permitted to recover 100 percent of the stranded costs resulting from the industry restructuring required by Order No. 636. The Commission did this by requiring the pipeline to discount all the way through its base rates before discounting the surcharge. This approach maximizes the pipeline's recovery of the costs underlying the surcharge including from discounted customers, thereby minimizing the need to shift costs to the non-discounted customers. This policy is incorporated into Dominion's tariff and applies to the instant TCRA rate computations.

81. Thus, Dominion cannot shift its TCRA costs to its non-discounted shippers who pay TCRA surcharges, or to any of its shippers who pay some level of reservation charges. The Commission directs Dominion to file revised TCRA rates and supporting workpapers to reflect imputed billing determinants associated with all of its negotiated rate agreements, including volumetric and lump sum agreements, and a credit to the TCRA as if these negotiated rate customers who paid volumetric rates, had paid TCRA reservation surcharges commensurate with such billing determinants.

### 4. **<u>Rehearing</u>**

82. In its request for rehearing, Dominion states that GT&C section 15.4.A provides, in pertinent part, that the Unrecovered Transportation Cost Account should be credited (reduced) by revenues Dominion receives attributable to the Transportation Cost reflected in Dominion's rates, *i.e.*, the TCRA reservation and usage surcharges. According to Dominion, Mr. Wilhelm contends that Dominion should recover reservation-based TCRA surcharges from negotiated rate customers paying only volumetric rates and that, to do so, Dominion should use the 100-percent load factor rate for TCRA collection purposes from such customers. In the September 20, 2005 Order, the Commission required Dominion either (1) to make the "corrections" that Mr. Wilhelm suggests or

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[40] 109 FERC ¶ 61,355 at P 27 (2004).

(2) provide a more complete explanation of, and support for, its adjustment to the TCRA for volumetric negotiated rate revenues, including an explanation how no shipper is harmed by the methodology.[41] Dominion states that, if the Commission now requires it to attribute TCRA reservation surcharges to negotiated rates customers paying volumetric rates, it can do so only if it meets the applicable NGA section 5 burden of proof and impose the change prospectively.

83. The Commission denies Dominion's request for rehearing on this issue for the reasons stated above. Further, as stated above, the Commission has determined that Dominion's tariff permits adjustments for prior periods.

### G. Collection of TCRA Amounts from Lump Sum Negotiated Rate Payments

#### 1. Background

84. In his request for rehearing of the October 31, 2003 Order, Mr. Wilhelm argued that the Commission erred in not requiring Dominion to explain the collection of TCRA amounts from lump sum negotiated rate payments. He claimed that the Commission did not require Dominion to respond to his question regarding attribution of lump sum payments under negotiated rate agreements to the TCRA.

85. According to Mr. Wilhelm, Dominion's tariff cites two types of lump sum payments, the first of which is the minimum quantity provision, which is found on Sheet No. 1406 of the GT&C. Mr. Wilhelm stated that the second type is the purchase of reduction rights by Dominion's affiliate, Dominion East Ohio (DEO) pursuant to Sheet No. 1413 of the GT&C. Mr. Wilhelm asserted that, for the first type of payment, the Commission should require Dominion to (1) list all revenues received to fulfill the minimum quantity provision and (2) credit the TCRA based on the 100-percent load factor rate with interest. He contended that this list should include not only the TCRA period at issue in this proceeding, but also all prior TCRA periods for which Dominion understated TCRA revenues received.

86. Mr. Wilhelm also contended that, for the second type of payment, Dominion should indicate how much revenue it has received from DEO since April 2001. He claimed that, because these payments were made to allow for DEO to reduce its firm rights, and DEO reduced its firm contract entitlements, recourse rate shippers have been forced to absorb the TCRA costs previously paid by DEO. Mr. Wilhelm asked the Commission to require Dominion to (1) list the monthly firm entitlement reductions DEO has exercised since April 2001, (2) value these reductions by the then-effective monthly

[41] *Dominion Transmission, Inc.*, 112 FERC ¶ 61,321 at P 48 (2005).

TCRA rate, (3) calculate interest on these amounts, and (4) credit this amount to the TCRA.

87. In the September 20, 2005 Order, the Commission directed Dominion to list all revenues received to fulfill the minimum quantity provision, and to credit all lump sum reservation revenues to the TCRA based on the 100-percent load factor rate, with interest. The Commission further required Dominion to (1) list the monthly firm entitlement reductions DEO had exercised since April 2001, (2) value these reductions by the then-effective monthly TCRA rate, (3) calculate interest on these amounts, and (4) credit this total amount to the TCRA.

### 2. Compliance Filing and Comments

88. In the Compliance Filing, Dominion states that, in accepting Mr. Wilhelm's position in the September 20, 2005 Order, the Commission failed to provide Dominion the opportunity to provide an explanation of its position on this issue. While Dominion states that it will seek rehearing on this issue, it maintains that the Compliance Filing is consistent with the Commission's order, but Dominion asserts that the same argument raised in the preceding section regarding volumetric negotiated rate customers applies equally here.

89. First, Dominion points out that the Commission required it to list all revenue received to fulfill minimum quantity provisions under negotiated rate agreements and to credit all lump sum reservation revenues to the TCRA based on the 100-percent load factor rate, with interest. Dominion states that the information responsive to this requirement is set forth on Attachment B to the Compliance Filing. Dominion explains that this Commission directive results in a total credit to the TCRA of $477,621.

90. Second, continues Dominion, the Commission required it (1) to list the monthly firm entitlement reductions exercised by DEO since April 2001, (2) value these reductions by the then-effective monthly TCRA rate, (3) calculate interest on these amounts, and (4) credit this total amount to the TCRA. Dominion states that the information responsive to this requirement is set forth on Attachment C to the Compliance Filing, and this approach to the entitlement reductions results in a total credit to the TCRA of $367,737.[42] Dominion states that it adjusted DEO's firm entitlement reductions by volumes that were remarketed at maximum rates -- all GSS and FTNN-GSS entitlements, and all winter FTNN entitlements. To do otherwise, claims Dominion, would attribute a double credit to the TCRA.

91. Dominion agrees that, as required by the September 20, 2005 Order, it will credit these amounts to the TCRA where they will bear interest until reflected in rates (or

[42] Dominion states that interest is calculated to June 30, 2005.

reversed by subsequent decision). According to Dominion, the Commission did not require that Dominion immediately recalculate and change its TCRA rates to reflect the credits. Dominion proposes to do so only after a subsequent Commission decision on this filing and its request for rehearing.

92. In response to the Compliance Filing, Mr. Wilhelm states that Dominion provided some information regarding the amount of TCRA revenues to be credited based on lump sum revenues; however, he contends that this information has deficiencies that must be remedied. Mr. Wilhelm contends that Attachment B to the Compliance Filing lacks multiple elements. First, he states, Dominion failed to provide a reference to the basis of the lump sum revenue in column (b), which should include information such as shipper, contract number, and dekatherm. He also contends that column (d) (TCRA Recoveries) and column (e) (Interest) do not have the supporting details that show the calculations performed to generate the amount.

93. Mr. Wilhelm further claims that, while Attachment C to the Compliance Filing provides much detail, some deficiencies remain. He states that column (d) appears to be understated for FTNN reduction based on quantities and in Dominion's TCRAs, and column (e) is unsubstantiated and does not disclose who receives the remarketed quantities.

### 3. <u>Commission Analysis of Compliance Issues</u>

94. The Commission finds that Dominion has failed to fully comply with the requirements of the September 20, 2005 Order regarding lump sum negotiated rate payments as summarized by Mr. Wilhelm. Dominion is directed to correct the noted deficiencies and fully comply with the order. Dominion's failure to credit certain amounts to its TCRA based on lump sum negotiated rate payments underscores that Dominion's customers who pay reservation rates are subsidizing other classes of customers. The Commission directs Dominion to remedy the deficiencies that Mr. Wilhelm identified in his comments concerning the Compliance Filing.

### 4. <u>Rehearing</u>

95. In its request for rehearing of the September 20, 2005 Order, Dominion states that, in the final section of the order, the Commission accepted Mr. Wilhelm's argument that lump sum payments received by Dominion as part of negotiated rate agreements should similarly be recharacterized to act as if Dominion received TCRA payments on a

100 percent load factor rate as part of those payments.[43] However, Dominion contends that the Commission did not provide it an opportunity to explain its position on this issue.

96. Dominion argues that the Commission should reverse this ruling on rehearing. Dominion claims that its tariff provides for crediting to the TCRA only amounts actually received as TCRA surcharges rather than the approach adopted by the Commission in the September 20, 2005 Order. Moreover, continues Dominion, the Commission did not impose this requirement in approving either the DEO negotiated rate providing for contract buy-down payments or any of the negotiated rate agreements providing for volumetric rates. Accordingly, argues Dominion, the Commission could impose this change in approach only on a prospective basis, by first satisfying the NGA section 5 evidentiary burden.

97. Dominion states that the Commission has completely failed to meet that burden. Dominion claims that its current approach is reasonable as it offers considerable benefits to customers and may actually have reduced TCRA rates. Dominion states that, by agreeing to volumetric rates, Dominion was able to attract new determinants to its system that contributed at least some recovery (via the usage TCRA surcharge) of total TCRA costs, and Dominion did not incur any incremental TCRA costs by adding the volumetric surcharge customers. Similarly, Dominion agreed upon reductions in DEO's contractual entitlements in an effort to avoid the still-larger (or earlier) reduction in those entitlements that would have resulted in a greater share in TCRA costs to be borne by Dominion's other customers. Dominion contends that, because of factual, customer-specific issues such as these, the proper time for consideration of any special treatment of TCRA costs was in the proceedings that addressed each particular negotiated rate agreement. Finally, Dominion asserts that any remedy could be prospective only.

98. The Commission denies rehearing on this issue for the reasons stated above in discussing negotiated volumetric rate agreements. Further, as the Commission has stated repeatedly throughout this order, it interprets Dominion's tariff as permitting past period adjustments.

The Commission orders:

(A) Rehearing of the September 20, 2005 Order in this proceeding is denied as discussed in the body of this order.

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[43] Dominion cites *Dominion Transmission, Inc.*, 112 FERC ¶ 61,321 at P 54 (2005).

(B) The Compliance Filing is accepted to the extent discussed in the body of this order.

(C) Within 15 days of the date of issuance of this order, Dominion must submit another filing in compliance with the requirements of this order.

By the Commission.

( S E A L )

Magalie R. Salas,
Secretary.