THE ADMINISTRATIVE LAW SECTION OF THE VIRGINIA STATE BAR www.vsb.org/sections/ad/index.htm

Administrative Law News

VOLUME XV, ISSUE 2 AUGUST 2007

CONTENTS:

Not Yet Extinct: The State Corporation Commission Approves a $24 Million Increase for Appalachian Power in an "Old-Fashioned" General Rate Case ...1
D. Mathias Roussy, Jr.

FERC Steers PJM Through the Maze of Cost Allocation ...3
Kenneth A. Barry

Case Alert: United States Supreme Court Issues Opinion in Massachusetts v. EPA Addressing the Regulation of Greenhouse Gases ...4
Matthew B. Jones

Pleading Problems with Challenging RBOCs under Antitrust Laws – the Supreme Court decides Bell Atlantic v. Twombly ...5
Susan M. Hafeli

Will there be a Wind Farm in Highland County, Virginia? ...6
Kiva Bland Pierce

Commission Considering Changes to CLEC Rules on Access Charges, Orders Rulemaking on Switched Access Rates ...7
Kristian Mark Dahl

Technology Enhancements for SCC Courtrooms ...7
Cliona Robb

Not Yet Extinct: The State Corporation Commission Approves a $24 Million Increase for Appalachian Power in an "Old-Fashioned" General Rate Case

By D. Mathias Roussy, Jr.

The enactment of the Virginia Electric Utility Restructuring Act in 1999 ushered in a period of capped rates for electric utilities in the Commonwealth, subject to limited statutory exceptions.[1] So with capped rate service and the possibility of competitive supply beginning in 2001, the writing seemed to be on the wall that the "old-fashioned" general rate case setting electric rates pursuant to Chapter 10 of Title 56 of the Code was a thing of the past in the Commonwealth. However, Appalachian Power Company's rate application filed with the State Corporation Commission on May 4, 2006 proved the demise of Chapter 10 electric ratemaking to be premature. Although the Restructuring Act had capped Appalachian's base rates in 2001, legislative amendments to the Restructuring Act in 2004 that extended the expiration of capped rates from July 1, 2007 to January 1, 2011 also provided Appalachian with the opportunity to initiate two general rate cases in accordance with Chapter 10 of Title 56.[2]

Just two months after an Appalachian witness announced the Company's intention to file a general rate case while testifying in the first environmental and reliability ("E & R") case conducted by the Commission pursuant to § 56-582.B (vi) of the Restructuring Act,[3] the Company filed its general rate case application seeking to recover an additional $198.5 million in annual revenues.[4] For a residential customer using an average of 1,000

— *continued on page 8*

D. Mathias ("Matt") Roussy, Jr. is an Assistant Attorney General practicing in the Insurance and Utilities Regulatory Section of the Office of the Attorney General. He lives in Richmond with his wife Alison and son Mathias.

[1] 1999 Va. Acts ch. 411 (adding Chapter 23 in Title 56 of the Code of Virginia).

[2] 2004 Va. Acts ch. 827 (amending § 56-582.C of the Restructuring Act).

[3] *Application of Appalachian Power Company For adjustment to capped electric rates pursuant to § 56-582.B (vi) of the Code of Virginia*, SCC Case No. PUE-2005-00056.

[4] *Application of Appalachian Power Company For an increase in electric rates*, SCC Case No. PUE-2006-00065.

ABOUT THE EDITOR Ashley Beuttel Macko is an Assistant Attorney General in the Insurance and Utilities Regulatory Section at the Office of the Attorney General. Before joining the Attorney General's Office in 2005, she worked in private practice for a large law firm. She has experience in administrative and regulatory law matters including electric, natural gas, telecommunications, water and insurance issues. She received her J.D. from the University of Richmond and her undergraduate degree from Wake Forest University.

2008 NRC Plans Underway!

Plans have already begun for the 2008 National Regulatory Conference ("NRC"). This year's committee is headed by ***Kiva Bland Pierce***. If you have suggestions for topics and/or speakers for the upcoming NRC, please contact Kiva at **kpierce@oag.state.va.us** or **804-786-3809**. Be on the lookout for notification regarding the dates for the 2008 NRC!

SCC ESTABLISHES CHIEF ADMINISTRATIVE OFFICER; NAMES DANNY M. PAYNE TO POSITION

The State Corporation Commission ("SCC") has created the position of Chief Administrative Officer with the duty to assist the Commission with its administration of the 600-person independent department of state government. Danny M. Payne, former Virginia Tax Commissioner, began the new position March 16, 2007. Mr. Payne is anticipated to manage the day-to-day administrative support functions of the SCC. The SCC's four administrative divisions will report directly to Mr. Payne. They include the divisions responsible for the SCC's budget, personnel, computer technology, and public and government relations.

Mr. Payne brings with him 30 years of experience in state government. From 1994 to 2002, Payne served as Virginia's Tax Commissioner. Mr. Payne is expected to guide the SCC on a program to define key operational strategies, optimize business operations, and improve the SCC's services to the citizens of the Commonwealth. According to the SCC, he most recently served in a senior executive level position with a private contractor to modernize business systems at the Internal Revenue Service.

VIRGINIA STATE BAR ADMINISTRATIVE LAW SECTION

Committee Chairs 2007-2008

National Regulatory Conference:
KIVA BLAND PIERCE
kpierce@oag.state.va.us / 804.786.3809

Annual Meeting CLE Program:
VISHWA B. LINK
Vishwa_Link@Dom.com / 804.819.2458

Brown Bag Speakers Lunch:
JIM COPENHAVER
jcopenhaver@nisource.com / 804.768.6408

Newsletter:
ASHLEY BEUTTEL MACKO
amacko@oag.state.va.us / 804.786.5852

©2007, The Virginia State Bar, Administrative Law Section
All Rights Reserved

Administrative Law News

is published by the Virginia State Bar's Administrative Law Section. Statements, expressions of opinion or comments appearing herein are those of the editors or contributors, and not necessarily those of the Virginia State Bar or the Section. Articles and materials accepted for publication become the property of the Virginia State Bar's Administrative Law section and may not be reprinted without the express written permission of the editor.

FERC Steers PJM Through the Maze of Cost Allocation

By Kenneth A. Barry

PJM's[1] transmission planning and cost allocation processes have, over the last year, become mired in controversy and administrative litigation, forcing some dramatic turning points a decade after the long-standing mid-Atlantic power pool transformed itself into an ISO (approved by the Federal Energy Regulatory Commission in 1997) and then an RTO (approved by FERC in 2001). The apex has arrived in recent months with these noteworthy developments:

- In its Regional Transmission Expansion Plan (RTEP) process,[2] PJM abandoned its policy of reserving a one-year window for "market solutions" (such as generation, demand resources, and merchant transmission projects) in lieu of planned transmission upgrades. Now, transmission planning and construction can go forward on an even footing (*i.e.,* without the mandatory holding period), although alternative solutions may still step in and displace transmission expansions yet to commence.
- Batches of specific PJM Board-approved transmission projects awaiting FERC approval entered a logjam, as stakeholders with diverse interests from different geographical parts of PJM's region took different stands on how to interpret and apply the "beneficiary pays" criteria PJM follows in its cost allocation and rate design for new transmission investment. With these individual dockets under a virtual siege due the lack of consensus on precisely how expansion costs should be allocated to specific transmission customers, FERC has attempted to cut the Gordian knot by consolidating all the cases and assigning them to a single Administrative Law Judge (ALJ) empowered to hear the competing arguments and determine the most appropriate version of a "beneficiary pays" rate design.
- For new, high-voltage transmission investment (operating at 500 kV or above), FERC decreed that, rather than attempting to isolate and assign cost responsibility in proportion to anticipated relative benefits, all such costs should be spread uniformly over all PJM loads (a rate design most commonly called "postage stamp"). This sweeping decision, Opinion No. 494,[3] entailed overruling another ALJ's determination of how to allocate PJM's existing system and expansion costs — in the process upsetting stakeholders on the western side of PJM's footprint.

At this point, the controversy is a long way from being quelled, but FERC believes it has at least put the issues on a decisional track that will ultimately provide the legal foundation and business certainty PJM needs to move steadily forward with the planning, approval, and construction of needed transmission. It could not come too soon.[4] What

— *continued on page 10*

Kenneth A. Barry is a long-time energy attorney who practiced in-house for a major Richmond-based industrial consumer, Reynolds Metals, for over twenty years. He was then Counsel with Hunton & Williams' Washington, D.C. office, working primarily on behalf of independent transmission entities as well as advising in various FERC and state electric and gas regulatory matters. Since 2006, he has assisted a major law firm in advising clients on FERC developments in a consulting capacity. He is a member of the Virginia, D.C., and New York bars.

[1] The PJM RTO operates the transmission systems of utilities in all or parts of the states of Pennsylvania, Ohio, Virginia, West Virginia, Illinois, Indiana, Kentucky, Maryland, North Carolina, Tennessee, and the District of Columbia.

[2] Joint transmission planning is one of the core functions of an RTO, and thus has been a centerpiece of PJM's coordination among regional utilities over the last several years. Under RTEP, the PJM Board reviews proposed transmission expansion projects developed by PJM staff in conjunction with its participating Transmission Owners (TOs) and other stakeholders. Projects passing these hurdles are then submitted to FERC in a "report" (in chronologically linked batches) along with the PJM-proposed cost allocations to specific wholesale transmission customers, as well as to merchant transmission projects (which are treated as "load"). FERC then reviews and approves, rejects, or modifies the proposals pursuant to its Federal Power Act (FPA) jurisdiction over regional transmission rates. The proposed transmission construction projects are still subject under state law to siting certification processes.

[3] *PJM Interconnection, L.L.C.,* 119 FERC ¶61,063 (April 19, 2007).

[4] Much has been written in recent years on the critical linkage between transmission expansion and competitive generation markets. These analyses have begun by noting the under-investment in transmission expansion over the last 15 years or so, in comparison with load growth and generation construction. Transmission bottlenecks have created "load pockets" (usually in growing population centers) that have raised increasing reliability concerns. And whether or not reliability is implicated, limited transmission access hinders the ability of competitive energy markets to deliver the promise of low and relatively stable electric power rates by effectively

Case Alert: United States Supreme Court Issues Opinion in Massachusetts v. EPA Addressing the Regulation of Greenhouse Gases

By Matthew B. Jones

In 1999, several private organizations, joined by the Commonwealth of Massachusetts, filed a rulemaking petition requesting the Environmental Protection Agency (hereinafter "EPA") regulate greenhouse gas emissions (hereinafter "GHG emissions") from new motor vehicles pursuant to § 202 of the Clean Air Act. In September 2003, EPA entered an order denying the petition for two reasons: (i) the Clean Air Act did not authorize EPA to issue mandatory regulations addressing global climate change, and (ii) that even if it had the authority to regulate GHG emissions, the timing rendered the issuance of such regulations inappropriate.

Massachusetts, joined by several other state and local governments, sought review of EPA's order in the U.S. Court of Appeals for the D.C. Circuit. In the plurality opinion, two judges agreed that EPA properly exercised its discretion under § 202(a)(1) in denying the petition based on public policy concerns and the absence of "particularized" injury to establish standing, as required by *Lujan v. Defenders of Wildlife*, 504 U.S 555, 562 (1992). The dissenting opinion found that Massachusetts had satisfied the elements necessary to establish standing - injury (in the form of property damage from increased sea levels), causation (increased GHG emissions lead to increased sea levels), and redressability (mitigation of the deleterious effects of global warming).

Massachusetts appealed the plurality opinion, and the Supreme Court granted certiorari to the Court of Appeals for the D.C. Circuit on three issues:

1. Has Massachusetts established standing to sue in federal court?

2. Does § 202(a) (1) of the Clean Air Act authorize EPA to regulate GHG emissions for new motor vehicles in the event that it forms a "judgment" that such emissions endanger the general welfare of the public?

3. Assuming EPA has a statutory duty to regulate GHG emissions, under what circumstances may it refuse this duty?

Massachusetts took the position that § 202(a) (1) of the Clean Air Act authorized EPA to regulate carbon dioxide emissions from new motor vehicles and that carbon dioxide was an air pollutant within the definition articulated by the statute.[1] It argued that regulation would curb carbon dioxide emissions, and in conjunction with other global attempts to reduce emissions, would prevent encroaching sea levels from damaging coastal property.

EPA, contrariwise, argued that Congress did not intend for it to regulate substances that contribute to climate change, maintaining that carbon dioxide was not an "air pollutant" within the meaning of § 202(a) (1). The agency reasoned that Congress, well aware of the global warming issue, had not proposed an amendment establishing mandatory GHG emissions limitations on new motor vehicles, and that this omission was dispositive of EPA's lack of authority to regulate GHG emissions. EPA claimed that Congress designed the Clean Air Act to address local pollutants, not CO2, a substance consistently present throughout the global atmosphere. Assuming it had the authority to regulate GHG emissions, EPA argued that it would refuse to exercise that authority, grounding this policy in the National Research Council's 2001 Report finding that the causal link between increased atmospheric GHGs and increased surface air temperatures could not be conclusively established. In addition, unilateral control vested in the EPA would interfere with the President's ability to persuade developing nations to reduce GHG emissions.

Standing. The majority opinion (5-4) was written by Justice John Paul Stevens.

— continued on page 13

Mr. Jones is a second year law student at T.C. Williams School of Law at the University of Richmond. He has an undergraduate degree from the University of Virginia. He recently interned at the Office of the Attorney General, Insurance and Utilities Regulatory Section. Mr. Jones is a member of the Law Review and can be reached at matthew.jones@richmond.edu.

[1] 42 U.S.C. § 7602(g) (2007) (stating that "any air pollution agent or combination of such agents, including any physical, chemical…substance or matter which is emitted into…ambient air").

Pleading Problems with Challenging RBOCs under Antitrust Laws – the Supreme Court decides Bell Atlantic v. Twombly

By Susan M. Hafeli

In an opinion that has stirred debate about its implications for federal pleading, the U.S. Supreme Court in *Bell Atlantic v. Twombly,* 550 U.S. ___, 127 S.Ct. 1955 (2007) (*Twombly*) has held that to survive a motion to dismiss, a § 1 antitrust conspiracy complaint predicated on defendants' parallel conduct must allege some factual context suggesting agreement, a critical element of § 1. A § 1 parallel-conduct complaint that lacks such facts fails to nudge plaintiffs' claims "across the line from conceivable to plausible" and must be dismissed.[1]

This "plausibility standard" appears to apply only to complainants alleging a § 1 antitrust conspiracy claim predicated on parallel conduct. In explaining its decision, however, the *Twombly* Court scrapped a famous observation from its 1957 *Conley v. Gibson* opinion long cited in support of liberal pleading.[2] Because the Court's retirement of the *Conley* language does not appear limited to § 1 antitrust complaints, *Twombly* may be construed to establish stricter pleading requirements in the federal courts and the 27 jurisdictions, including Virginia and the District of Columbia, that have followed the *Conley* formulation.[3]

The Supreme Court granted certiorari in *Twombly* to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.[4] Decisions of the First, Sixth, and Tenth Circuits in such cases have required the pleading of "plus factors" to survive a motion to dismiss. Under the "plus factors" standard, § 1 complaints based on parallel conduct must include allegations that, if true, would support a claim of conspiracy. The Second Circuit, in reversing a district court decision dismissing the *Twombly* complaint, found such allegations unnecessary.

In their complaint, plaintiffs William Twombly and Lawrence Marcus sought to represent a potentially enormous class, one consisting of at least 90 percent of all subscribers to local telephone or high speed Internet services in the continental United States over a seven-year period beginning February 8, 1996.[5] Plaintiffs alleged that each of then-remaining Regional Bell Operating Companies conspired to restrain trade in two ways. First, these incumbent local exchange carriers (ILECs) engaged in "parallel conduct" in their respective service areas to inhibit the growth of upstart competitive local exchange carriers (CLECs). Examples of this parallel conduct included making unfair agreements with the CLECs for access to ILEC networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. Second, plaintiffs alleged that the ILECs agreed to refrain from competing against one another, inferred from their common failure to pursue opportunities in each other's territories. The complaint recited conclusory allegations of a "contract, combination or conspiracy" among the ILECs but offered no facts regarding the purported agreement(s).

The U.S. District Court for the Southern District of New York dismissed the complaint for failure to state a claim, finding that it lacked facts from which to infer that the ILECs' actions were the result of a conspiracy. The court concluded that the ILECs' own interests in defending their territories "fully explained" the parallel conduct. The district court also concluded that the complaint lacked facts suggesting that refraining from competing in other ILEC's territories as CLECs was con-

— continued on page 15

Susan M. Hafeli is a Utility Analyst with Fairfax County. Prior to joining the County, Susan was an attorney in private practice, advising and representing clients in transactional, litigation, and federal and state regulatory matters.

1 All citations are to the slip opinion, available at http://supremecourtus.gov/opinions/06pdf/05-1126.pdf. *Twombly* at 24.

2 *Conley v. Gibson,* 355 U.S. 41 (1957).

3 Dissent at 8-9; *see* fn 5, citing *inter alia NRC Management Servs. Corp. v. First Va. Bank-Southwest*, 63 Va. Cir. 68, 70 (2003) ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it.").

4 Previous decisions of the Court involving a § 1 complaint had addressed the sufficiency of evidence. In these decisions the Court had concluded that that parallel conduct, without more, does not support an inference of illegal agreement sufficient to survive a motion for summary judgment or directed verdict. *Twombly* at 7, citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) and *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537 (2003).

5 *Twombly* at 12. The complaint consisted of all subscribers of local telephone and Internet services provided by the then-remaining Regional Bell Operating Companies (BellSouth Corporation, Qwest Communications, SBC Communications, Inc. and Verizon Communications, Inc., successor-in-interest to Bell Atlantic Corporation).

Will there be a Wind Farm in Highland County, Virginia? Case No. PUE-2005-00101 By Kiva Bland Pierce

On November 8, 2005, Highland New Wind Development, LLC ("Highland Wind") filed an application with the Virginia State Corporation Commission ("Commission") for certification of a generating facility in Highland County, Virginia pursuant to Virginia Code Sections 56-46.1 and 56-580(D) ("Application"). Highland Wind proposes to build and operate up to 20 wind turbines along a mountain ridge on Allegheny Mountain near the Virginia-West Virginia border. This is the first wind-powered generation project to be considered by the Commission. Generally, the Commission is required to approve the facility upon a finding "that such generating facility and associated facilities (i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility and (ii) are not otherwise contrary to the public interest." Va. Code § 56-580(D). The Commission must also "give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact." Va. Code § 56-46.1. The Application further noted that the Board of Supervisors of Highland County had previously approved a conditional use permit for the project and that that the federal production tax credit, a federal tax incentive to build the wind-powered turbines, would expire at the end of 2007.

In its Order for Notice and Hearing issued on December 28, 2005, the Commission, among other things, established a procedural schedule that included public hearings in Monterey, Virginia, and further directed a hearing examiner to take evidence and make recommendations to the Commission for its consideration.

Highland Citizens (comprised of seven Highland County residents), The Nature Conservatory in Virginia, the Highland County Board of Supervisors and Michael A. King, President of Old Mill Power Company, filed notices of participation. Highland Citizens filed two unsuccessful Motions to Dismiss and numerous public comments were filed. In total, two hundred and sixteen individuals filed comments in opposition to the Application; ninety-three individuals filed comments in support of the Application. At the public hearings in Monterey, Virginia, twenty-seven and thirty-nine public witnesses, respectively, testified.

On February 8, 2006, Highland Wind pre-filed testimony of four witnesses. They addressed renewable energy projects, and the impacts to endangered or threatened species, bats, and flying-squirrels. The Virginia Department of Environmental Quality filed its reported on June 30, 2006. It listed six permits or approvals that may be required for the project and made fourteen recommendations as conditions on the certificate, including viewshed analyses, assessment of cumulative impacts, pre-construction surveys, post-construction monitoring, and development of a mitigation plan.

Highland Citizens and The Nature Conservatory pre-filed testimony on September 1, 2006, both in opposition to the proposed generation project. Staff pre-filed three witnesses' testimony on October 2, 2006. Staff witness Gregory Abbott concluded that the proposed interconnection with Allegheny Power Company would not adversely impact the reliability of the electric transmission system. Staff witness Tommy Oliver found that the project was financially viable, but suggested a "sunset" provision on the certificate providing it would expire if construction of the facility had not begun within two years of the Commission order granting the certificate. Finally, Staff witness Mark Carsley reviewed the potential economic development benefits and determined that the primary positive economic impact would be the additional real property tax revenue to be collected by Highland County.

Highland Wind pre-filed rebuttal testimony on October 12, 2006. Several evidentiary hearings were convened during the months of October and November 2006 in Richmond. During the course of these hearings, twenty-two public witnesses offered testimony at the hearings. Following the close of the hearings, post-hearing briefs were submitted by the parties.

On March 1, 2007, Alexander F. Skirpan, Jr., Hearing Examiner, issued his report. The Hearing Examiner found that the proposed facility would have no material adverse

— *continued on page 16*

Kiva Bland Pierce is an Associate Attorney General in the Insurance and Utilities Regulatory Section. Prior to joining the Office of the Attorney General in March 2007, she was an associate with The Conrad Firm for four years concentrating on regulatory, administrative, and business law as well as general litigation. After she received her J.D. from the University of Richmond, T.C. Williams School of Law in 2001, she served as a judicial clerk at Henrico Circuit Court. Her undergraduate degree comes from Louisiana State University (Geaux Tigers!).

Commission Considering Changes to CLEC Rules on Access Charges Orders Rulemaking on Switched Access Rates

By Kristian Mark Dahl

The Virginia State Corporation Commission (the "Commission") issued an order on April 30, 2007 on Verizon's request to establish a cap on the intrastate access rates that competitive local exchange carriers ("CLECs") may charge.[1] While declining to grant Verizon's application in full, the Commission initiated a separate rulemaking proceeding in recognition of "the disparity between Verizon's intrastate access rates and CLECs' intrastate access rates," and set forth revised rules and definitions applicable to CLEC regulation in Virginia (the "proposed CLEC Rules").

While the proposed CLEC Rules did not mirror the exact changes Verizon sought as part of its application in

— continued on page 18

Kris Dahl is an associate in the Energy Group at MCGUIRE-WOODS, LLP in Richmond, Virginia. Kris' practice is concentrated in the area of federal and state regulation of public utilities and energy markets, including the representation of electric, gas and telecom utilities primarily before FERC and state regulatory commissions.

1 *Application of Verizon Virginia Inc., Verizon South Inc. and MCImetro Access Transmission Services of Virginia, Inc.*, Case Nos. PUC-2007-00154, Order on Application and Establishing Proceeding (April 30, 2007) ("Rulemaking Order").

Technology Enhancements for SCC Courtrooms

By Cliona Robb

On Friday, May 25, 2007, members of the Administrative Law Section were given a guided tour of the SCC's new courtroom technology. Andy Farmer in the SCC's Division of Information Resources was our tour guide. Andy has been working on the technology enhancements to the SCC courtrooms, which were recently put in service.

All of the courtrooms have new sound systems that will greatly enhance the audio quality of a proceeding. This may prove a mixed blessing for members of the Administrative Law Section. The Division of Information Resources designed the system so that the default mode is "on." This means side bars between attorneys, or consultations with expert witnesses, could all be picked up on the vastly improved sound systems.

Courtroom C now boasts ten LCD monitors and a large screen to display evidence from a "presentation stand." This stand (a wooden podium with lots of electronic hook-ups) features a computer interface for lap tops, a document camera, and a DVD/VHS player. Computer interfaces are also provided at the attorney tables and bench. All this technology is controlled by a Creston wireless control panel. An added bonus for the hearing impaired is an infrared hearing assistance system.

As a veteran of proceedings involving the siting of electric transmission lines, I am pretty excited about the potential for enhanced courtroom presentations. Anyone can now take an exhibit, mark on it to show a particular point, have that mark up displayed to the entire courtroom on the large screen, and then have that mark-up printed and entered into the record as a hearing exhibit. My only reservation so far about the new technology is the potential for "hearing" exhibits to have a much larger impact than "pre-filed" exhibits. To conserve time and effort, SCC hearing examiners typically do not allow expert witnesses to summarize their pre-filed testimony. If an expert witness has pre-filed a really informative map or compelling photographs, those do not automatically get displayed on the SCC large screen. If an expert witness responds to other parties' testimony with a map or photograph, that does make it to the large screen. I wonder if there will be a need in the future to allow greater flexibility for display and discussion of pre-filed exhibits.

As you enter the new, improved Courtroom C for your next hearing, just remember to bring your laptop and watch what you say in front of those microphones!

Cliona Robb is a partner with Christian & Barton, L.L.P., where her practice focuses on the energy and telecommunications industries, including local government issues.

Appalachian Power *(continued)*

kilowatt hours/month, this request represented a 25% rate increase.

On May 30, 2006, the Commission entered a procedural order setting the matter for hearing and suspending the implementation of interim rates, subject to refund with interest, until October 2, 2006, the latest date permitted by law.[5] The Commission also appointed Hearing Examiner Alexander F. Skirpan, Jr., to take evidence and to make recommendations for the Commission's consideration.

> ***Despite the considerable number of contested issues, differences on three key issues – the proposed use of a forecasted test year, treatment of off-system sales margins, and the appropriate return on equity – accounted for most of the difference between the parties.***

In addition to Appalachian and Commission Staff, parties participating in the proceeding included the Office of the Attorney General's Division of Consumer Counsel and intervening respondents the Old Dominion Committee for Fair Utility Rates, the Virginia Municipal League/Virginia Association of Counties Appalachian Power Steering Committee, Kroger, Steel Dynamics, Inc., and Wal-Mart. In all, parties pre-filed with the Commission forty-seven direct and rebuttal testimonies, along with accompanying attachments. Public witnesses were heard on November 7 and December 6, 2007. The evidentiary hearing commenced December 6 and concluded December 13, 2006.

Although no party argued that Appalachian was not legally entitled to a rate increase, there was significant disagreement as to the magnitude of such increase. As a result of numerous contested issues, the bottom-line revenue requirement increases recommended by the participants in the proceeding ranged from $198.5 million, proposed by Appalachian and reflected in interim rates, to $13.9 million, recommended by Commission Staff. Based on the record developed in the proceeding, the Hearing Examiner's March 28, 2007 report recommended that the Commission approve a revenue increase of $30.621 million for Appalachian. On May 15, 2007, the Commission entered a final order adopting most of the Hearing Examiner's recommendations and approving a $24.0 million increase. On May 30, 2007, the Commission denied Appalachian's petition for reconsideration and clarification.

Despite the considerable number of contested issues, differences on three key issues – the proposed use of a forecasted test year, treatment of off-system sales margins, and the appropriate return on equity – accounted for most of the difference between the parties. These issues are addressed, briefly and in turn, below.

The "test year" method for ratemaking estimates a utility's revenue requirements based on its actual expenses during a recent twelve-month period, subject to proper ratemaking adjustments. With respect to the issue of how far to adjust the 2005 test year to set base rates, Appalachian proposed using projections extending 21 months beyond the test year. In contrast, Commission Staff, Consumer Counsel, the Old Dominion Committee and the Steering Committee recommended adjusting the test year only through June 2006, based on actual data.

In recommending adoption of a test year updated through June 2006, the Hearing Examiner confirmed long-standing precedent that test year adjustments pursuant to Virginia Code § 56-235.2 "are only permitted and not mandatory and are within the broad discretion of the Commission"[6] and stated that "[t]hough [Appalachian's] projections may be useful for management purposes, from a ratemaking perspective, these adjustments may be considered speculative or less than certain."[7] The Commission adopted the Hearing Examiner's recommendation, holding that "Appalachian has not shown that its post-June 2006 adjustments … will produce just and reasonable rates."[8] Notably, the Commission went one step further than the Hearing Examiner and ruled that Appalachian's projections were, in fact, speculative, and therefore prohibited by law.[9]

At the most basic level, off-system sales are opportunity sales of electricity made to buyers other than the utilities' native load retail ratepayers. To determine the proper ratemaking treatment of Appalachian's off-system sales margins in this case, the Hearing Examiner identified the following three sub-issues:

— continued on next page

[5] Va. Code § 56-238.
[6] *Application of Appalachian Power Company For an increase in electric rates*, SCC Case No. PUE-2006-00065, Report of Alexander F. Skirpan Jr. at 32 (Mar. 28, 2007) (citing *Roanoke Gas Co. v. SCC*, 225 Va. 186, 189 (1983)).
[7] *Id.* at 33.
[8] *Application of Appalachian Power Company For an increase in electric rates*, SCC Case No. PUE-2006-00065, Final Order at 11 (May 15, 2007).
[9] *Id. See also* Va. Code § 56-235.2 (prohibiting the Commission from considering "any adjustments or expenses that are speculative or cannot be predicted with reasonable certainty").
[10] Report of Alexander F. Skirpan Jr. at 36.

Appalachian Power *(continued)*

(i) the level of [off-system sales] margins that should be considered in this proceeding;

(ii) whether [off-system sales] margins should remain as a reduction to base rates or become part of the fuel factor or other tracking mechanism; and

(iii) whether there should be a sharing of [off-system sales] margins between customers and shareholders[10]

Notably, the Commission went one step further than the Hearing Examiner and ruled that Appalachian's projections were, in fact, speculative, and therefore prohibited by law.

The Commission resolved the first off-system sales sub-issue consistent with its adoption of the Hearing Examiner's recommended adjustment of the test year, discussed above. Accordingly, the level of off-system sales margins approved by the Commission for purposes of setting rates in this case was based on actual margins earned by Appalachian through June 2006 and not projected margins, as proposed by Appalachian.

The Commission did not, however, adopt the Hearing Examiner's recommendation to split ratemaking treatment of off-system sales margins between the Company's base rates and the fuel factor. Instead, the Commission established a stand-alone rate rider.[11] Contrary to the Hearing Examiner's recommendation, the Commission also declined to allow the Company to retain a modest portion of off-system sales margins earned, concluding that "continuing to reflect 100% of [Appalachian's] adjusted test year [off-system sales] margins in rates remains consistent with the fact that customers have paid, and continue to pay, the fixed costs incurred to provide the infrastructure used to produce such margins."[12]

With respect to the third issue, the record contained three recommendations on a fair authorized return on equity ("ROE"). Appalachian recommended Commission approval of a ROE range of 11.0% - 12.0%, with the mid-point of 11.5% recommended for setting rates while Commission Staff and Consumer Counsel recommended much lower ROE ranges (9.4% - 10.4% and 9.5% - 9.75%, respectively). Commission Staff and Consumer Counsel also recommended setting rates at the low-end of their recommended ROE ranges because of the November 20, 2006 ruling in the E & R case. In the E & R ruling, the Commission authorized Appalachian to recover, on a dollar-for-dollar basis, certain incremental environmental and reliability costs pursuant to Virginia Code § 56-582.B (vi).

Ultimately, the Commission adopted the Hearing Examiner's recommended ROE range of 9.6% to 10.6% but did not adopt his recommendation to use the midpoint of that range for purposes of setting rates. The Commission found instead that "the record is sufficiently developed by Consumer Counsel and Staff to justify a ten basis point reduction from the midpoint to reflect the reduced risks resulting from the Company's dollar-for-dollar recovery of certain environmental and reliability costs."[13]

The long-term impacts of the Commission's ruling are less clear than its short-term impacts. In the short-term, Appalachian customers' rates have already been lowered and customers will receive refunds with interest. The Commission ordered Appalachian to lower its rates from the interim rates, which had been in effect since October 2006, to the approved rates for bills rendered on and after June 14, 2007. In addition, the Commission provided Appalachian with a 90-day window to provide refunds to ratepayers.

Given the scarcity of Chapter 10 rates cases for electric utilities in recent years, especially those that have not been resolved by settlement, at first blush the Commission's ruling in the Appalachian case seems to provide a more current blueprint for future rate cases by electric utilities. Although this may be true to some degree, the "re-regulation" legislation enacted by the General Assembly during the 2007 legislative session altered the manner in which rates will be set for electric utilities in the Commonwealth.[14] After December 31, 2008, capped rates for investor-owned electric utilities will be replaced with rates set as a result of biennial rate review proceedings before the Commission. Although the 2007 legislation provides that utilities' biennial rate review proceedings will be conducted in accordance with Chapter 10, it also contains provisions addressing Commission treatment of certain ratemaking issues including test year, off-system sales, and return on equity.[15] Thus, the full impact of the Commission's decision in Appalachian's general rate case remains to be seen.

[11] Final Order at 14.
[12] *Id.* at 13.
[13] *Id.* at 20.
[14] *See* 2007 Va. Acts ch. 888 and 933.
[15] The author notes that on July 17, 2007, Appalachian filed with the Commission an application seeking a fuel factor adjustment based on the Company's interpretation of the 2007 legislative amendments addressing rate treatment of off-system sales. *See Application of Appalachian Power Company To revise its fuel factor pursuant to § 56-249.6 of the Code of Virginia,* SCC Case No. PUE-2007-00067.

FERC Steers PJM *(continued)*

follows is a closer look at the relevant cost allocation methods, the principle order FERC issued, and how it proposes to deal with the fundamental but thorny questions of allocating transmission project costs representing widely differing vintages, voltages, and regional (or sub-regional) needs.

On the other hand, the Commission reversed the ALJ's even more controversial determination that the postage stamp design was appropriate for existing facilities. In explaining its rejection, FERC noted that PJM was formed around a broad stakeholder consensus that license plate rate design, with its minimization of cost shifting, should apply.

MODELS FOR TRANSMISSION RATE DESIGN IN PJM

Like most ISOs and RTOs, when PJM began to offer new "de-pancaked" transmission tariffs that accomplished FERC's goal in Order 888 (and, subsequently, Order 2000) of providing region-wide transmission access for a single charge, it adopted the rate design that least upset the applecart. This was the so-called "license plate" rate design. It divided the PJM footprint up into discrete "pricing zones" in which the single transmission access charge was based on the embedded costs historically charged by the dominant franchised utility that had served that zone. Because this tended to minimize potential cost-shifting[5] between pricing zones that might have sharply differing embedded transmission costs, it was the most politically palatable solution. However, even while approving this rate design, FERC and the PJM stakeholders anticipated a future phase in which transmission costs would be more "regionalized" through alternative rate designs.

One such alternative, embraced early on, targeted the transmission investments stemming from the new, central planning mechanism, RTEP, that devotes greater attention to the needs of multiple utilities and loads across several pricing zones, as opposed to the narrower focus of pre-ISO/RTO planning on the needs of a particular utility. The cost allocation approach most attuned to this type of multi-load planning (and championed by FERC) bears the label "beneficiary pays." Although the technical process of assessing just what customer loads do benefit the most from a particular expansion project, and in what proportions, is fraught with controversy, PJM plunged into the exercise.[6] The prevailing methodology, with the "beneficiary pays" model for expansions grafted to pricing zone rates based on historic costs, became known as "modified license plate" rate design, reflecting the old versus new dichotomy.

However, the most radical approach emphasizing the "regionality" of joint transmission planning is the "postage stamp" rate design. This method "socializes" the cost of transmission investment uniformly throughout the transmission provider's footprint. In theory, it can be applied to any category of transmission investment – new or existing, high-voltage or low-voltage. Most RTOs and ISOs have already adopted some form of postage stamp rate design, though in tentative steps (such as a gradual phase-in or via a limited percentage of the total cost category involved). As we shall see, postage stamp rate design has its supporters in PJM as well.

OPINION NO. 494

A FERC ALJ threw a monkey wrench into the *status quo* by ruling, in a complaint proceeding brought by some PJM stakeholders seeking an interim resolution of the cost allocation debate, that the "postage stamp" approach to rate design should be adopted for all *existing* transmission facilities in PJM, replacing the license plate design. The inspiration for the ALJ's bold stroke came from his perception that, with the de-pancaking of transmission

— continued on next page

increasing the market shares of those suppliers able to reach "bottlenecked" customers. Since PJM's spot market pricing construct, "Locational Marginal Pricing" (LMP), calls for the marginal (*i.e.,* most expensive) needed generation unit to set the market-clearing price for all sellers in a constrained geographical area, the persistence of constraints pushes up prices by limiting the relief lower-cost suppliers might otherwise offer.

5 To be sure, it did not eliminate *all* cost shifting. The utilities that tended to export more power than they imported would see a net decline in transmission revenues versus costs as PJM eliminated multiple transmission charges for cross-utility transactions. To some extent, this revenue loss was addressed through a transition mechanism.

6 The technical analysis involves modeling flows from whatever loads (no matter what pricing zone they are found in) affecting a constraint (or a reliability standard "violation") and assigning cost responsibility accordingly. PJM uses an analytical tool called "DFAX," which measures "distribution factors" relative to a constraint.

rates, all transmission plant is of service to all PJM loads, and that the RTO's integrated operations are at odds with fragmentation into discrete pricing zone subregions with differing transmission charges, based on "historic" costs, paid by their respective loads. For new transmission, however, the ALJ would favor "beneficiary pays" as the most sensitive allocation model. While he found other methods potentially "just and reasonable," he concluded that current license plate rate design was emphatically not.

This ruling split the PJM stakeholders into a myriad of warring camps reflecting their subregional interests. The ALJ's advocacy of radical change to the rate design for existing facilities – *i.e.,* transmission cost equalization through the postage stamp approach – had relatively few outright supporters. However, some hybrid approaches did. For example, western PJM transmission owners such as AEP and Allegheny (and their regulators) threw their support behind a "highway-byway" design for existing facilities. This would entail dividing already-constructed facilities into high versus low voltage (the breakpoint can differ such as 345 kV or 500 kV) and then allocating the high-voltage "backbone" facilities on a postage stamp basis to the entire region, while maintaining the more localized "license plate" design for lower-voltage transmission plant.

PJM, for its part, declared neutrality in the battle over allocation and rate design for existing facilities, but urged FERC to adopt a postage stamp approach for all *new* facilities built to operate at 500 kV or greater. FERC, in its April 19 ruling, decided it liked PJM's suggestion for new facilities and cut to the chase, declaring-, without further deliberations, that the postage stamp rate design shall apply to newly constructed high voltage facilities at the 500 kV or greater level. On the other hand, the Commission reversed the ALJ's even more controversial determination that the postage stamp design was appropriate for *existing* facilities. In explaining its rejection, FERC noted that PJM was formed around a broad stakeholder consensus that license plate rate design, with its minimization of cost shifting, should apply.[7] The underlying rationale – that subregional systems were largely planned and constructed to serve the needs of local ratepayers – remains valid, FERC believes, despite the increasing pace of regional energy trade, and should be honored regardless of whether high or low voltage facilities are at issue. Thus, FERC also rejected the highway-byway alternative for existing facilities.

That left open the methodology for the currently approved, but litigation-plagued, "beneficiary pays" cost allocation and rate design for new facilities *below* the 500 kV threshold. Each pending FERC docket that was considering a discrete batch of new transmission projects with PJM-designated cost allocations based on its "beneficiary pays" methodology had been slowed down by stakeholder interventions seeking to challenge aspects of how PJM was interpreting or applying the theory. FERC concluded that all these cases should be consolidated, that partisans should be allowed to "have at it" and raise all types of objections,[8] but that, at the end of the day, the ALJ should adopt the most appropriate version of "beneficiary pays." Importantly, FERC also directed PJM to incorporate the resulting judgment in its tariff in a more detailed and transparent manner than the somewhat cryptic current tariff description of the "beneficiary pays" theory. The vision FERC enunciated in Opinion No. 494 is that, once a result had been adjudicated under the "big tent" of consolidated cases it has created, further controversy over PJM's allocation method should be sharply throttled back and transmission cost allocation cases will proceed smoothly through the multi-layered PJM/FERC approval process described above. FERC has no illusions, though, about the complexity of the proceedings it has directed, anticipating that the birth pangs of a new methodology will take some time to work through.[9]

Importantly, FERC also directed PJM to incorporate the resulting judgment in its tariff in a more detailed and transparent manner than the somewhat cryptic current tariff description of the "beneficiary pays" theory.

— continued on next page

7 FERC noted that the cost shifting that the ALJ's ruling would cause – particularly to utilities such as Virginia Electric and Power – was so severe that it might deter continued RTO formation.

8 Heretofore, FERC had tried to deter any protests that went to the PJM allocation methodology *per se*, thereby restricting challenges to factual aspects of the approved projects and how the methodology had been applied. This was proving a very difficult line to enforce.

9 Another facet of the controversy is whether so-called "reliability-based" projects and "economic projects" (designed mainly with a view to accessing less costly power) should be allocated according to the same methodology. FERC said it would not rule out, at this time, a different approach for economic projects, though it does not expect radical differences.

FERC Steers PJM *(continued)*

STAKEHOLDER PUSHBACK

Although FERC has attempted to set the table for resolving the controversy through administrative litigation, the requests for rehearing filed on Opinion No. 494 indicate that some stakeholders are far from satisfied. FERC's adoption of a postage stamp design for new, high voltage investment as well as its spurning of regionalization in rate design for existing high voltage facilities deeply troubles some western PJM advocates. For example, the state regulatory commissions of Ohio and Kentucky filed a joint rehearing pleading arguing that (1) by forsaking any regional cost allocation component for *existing* "backbone" facilities, the Commission is ignoring a history in which the constructing utilities (such as AEP) *did* have in mind service to more distant loads (and were then compensated by rate designs that have now been squeezed out, in the name of de-pancaking of multiple transmission charges); and (2) the "socialization" of costs throughout the PJM footprint of major new "backbone" transmission facilities is shifting costs back to regions where low-cost energy may be found (such as in AEP's zones) but where the costs of the incremental transmission capacity to export this power would *not* be allocated on a flow-based, "beneficiary pays" basis.[10] This distorts incentives, the state commissions maintain, asking plaintively, "Where is the justice and equity in this decision?" In their view, FERC has given them the worst of both worlds.

There are still plenty of issues, therefore, to be ironed out, and – one may predict with some confidence – more anguished pleadings before the PJM cost allocation waters have finally been calmed.

10 By way of illustration, the commissions represented that DPL in Ohio would see a 50% increase in transmission costs (about $20 million) due to FERC's postage stamp rate design for new high voltage facilities, while AEP would see an increase on the order.

OFFICERS ELECTED AT ANNUAL MEETING

At the May 22, 2007 Annual Meeting of the Section, the following officers and board members were elected: Brian R. Greene, Chair; Kiva B. Pierce, Vice Chair; Vishwa B. Link, Secretary; Ashley Beuttel Macko, Newsletter Editor & Board Member; Arlen K. Bolstad, Board Member; Mark A. Keffer, Board Member; Renata Manzo, Board Member; and Louis R. Monacell, Board Member.

The Board deeply recognized departing board members for their considerable contributions including Cliona Robb, Mike Quinan, Jay Holloway, Paige Holloway, Allison Held and Frank Lynch.

SCC CONSIDERS EXPANDED E-FILING, SEEKS COMMENTS

On August 10, 2007, the SCC docketed Case No. CLK-2007-00005 and issued an order seeking comments on proposed changes to the SCC's Rules of Practice and Procedure that will expand the ability to electronically file case-related documents. The proposed rule changes would allow electronic filing of documents of up to 100 pages. The SCC estimates that approximately 95% of all documents filed in Commission cases are less than 100 pages. The target date for the implementation of expanded e-filing is January 1, 2008.

The SCC has offered limited electronic filing to case participants on an experimental basis for several years. According to the SCC, more than 100 people are authorized to use the experimental e-filing program. Unlike some courts, electronic filing at the SCC is optional and strictly offered as a convenience to case participants. As an incentive to encourage electronic filing, the proposed changes would exempt electronic submissions from the Commission's rule regarding copies. Thus, when filing electronically, the filer is not required to file an original paper copy and 15 copies.

Anyone wishing to comment on the proposed rule changes is required to do so by September 25, 2007.

Greenhouse Gases *(continued)*

Regarding the issue of standing in this case, the majority ruled that Massachusetts satisfied the elements required by Article III to establish constitutional standing. The proper question, according to the Court, was whether Massachusetts had "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." (citing *Baker v. Carr,* 369 U.S. 186, 204 (1962)). Citing the Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, the majority reiterated its previous holding that three elements must be shown to establish standing: (i) concrete and personalized injury that is actual or imminent, (ii) EPA causation of the injury, and (iii) the likelihood that a favorable decision will redress that injury. The Court noted that when Congress affords a litigant a procedural right to challenge agency action, as it has here, the threshold for meeting these three elements is substantially mitigated. Applying the foregoing criteria, the Court held that as a sovereign state, Massachusetts had a strong interest in protecting its territory, solidifying its stake in the outcome. In terms of causation, encroaching sea levels are both actual and imminent injuries resulting from EPA's refusal to regulate GHG emissions. Finally, with respect to redressability, the Court found there was a strong likelihood that the relief requested will induce EPA to take steps to diminish that risk.

The proper question, according to the Court, was whether Massachusetts had "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination."

EPA authority to regulate.

With regard to EPA's authority to regulate GHG emissions from new motor vehicles, the Court held that the Clean Air Act charged EPA with the duty to regulate GHG emissions from new motor vehicles.[2] The Court found that EPA's restricted definition of "air pollutant" was contrary to the broad definition in the statute,[3] which was intended to impart flexibility to EPA in adjusting to scientific developments and unforeseen circumstances. The Court concluded that CO2 clearly fell within this definition. Moreover, the Court noted that prior to filing the order provoking litigation, EPA had never denied its authority to regulate GHG emissions, but instead affirmed that it had such authority.

EPA refusal of its regulatory duty.

The Clean Air Act conditions the exercise of EPA authority on its development of a "judgment," and the Court held that this "judgment" must relate to whether an air pollutant causes or contributes to air pollution, which might then increase the risk of danger to human health and welfare. According to the majority, If EPA finds that CO2 emissions endanger human health and welfare, the Clean Air Act requires that it regulate these emissions from new motor vehicles. The majority left EPA with two possibilities where inaction would be permissible: (i) if EPA determines that GHG emissions do not contribute to climate change or (ii) EPA provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine this inquiry. The Court found that the policy judgments offered by EPA were neither relevant to whether GHG emissions contribute to climate change, nor did they amount to a reasoned justification for declining to form a scientific judgment. If the scientific uncertainty surrounding various features of climate change is so pronounced that it precludes EPA from making a reasoned judgment as to whether GHGs contribute to global warming, EPA must expressly say so under the Court's opinion. According to the majority, a residual uncertainty was insufficient to justify EPA's omission to regulate GHGs.

Dissenting Opinions.

Chief Justice Roberts, joined by Justices Scalia, Alito amd Thomas.

The dissenting opinion written by Chief Justice Roberts held that the petitioners' challenges were nonjusticiable because appropriate redress of the petitioners' complaint was vested in the powers of Congress and the President, not the federal courts. Roberts noted that the relaxed standing requirements imposed by the majority had no basis in

— continued on next page

[2] 42 U.S.C § 7521(a)(1) (2007) (indicating that the EPA "shall by regulation prescribe…standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the EPA Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare").

[3] *Supra* note 1.

Greenhouse Gases *(continued)*

Supreme Court jurisprudence, and the petitioners should not have received "special solicitude." Coastal loss of land was a hypothetical injury, according to the Chief Justice, and therefore too attenuated to satisfy the Article III standard. Roberts found that the link between the alleged injuries and trace amounts of global emissions that might be reduced with EPA standards was weak and uncertain.

Justice Scalia, joined by Chief Justice Roberts, Justices Thomas and Alito.

Justice Scalia dissent argued that the policy judgments asserted by the EPA provided a reasoned justification that the EPA should not regulate GHG emissions at that time. Because the statute was silent on both the reasons for which the Administrator may defer making a judgment and the permissible reasons for opting not to address the issue at the present time, Justice Scalia found EPA's inaction permissible, relying on the NRC Report which indicated that the linkage between increased atmospheric GHGs and global climate warming could not be unequivocally established. Scalia also noted that the EPA did not have authority to regulate CO2 emissions from motor vehicles under § 202(a)(1) because CO2 was not an "air pollutant" under the CAA. According to Scalia, the majority wrongfully substituted its own desired outcome for the reasoned judgment of EPA.

Ramifications.

The consensus among experts seems to be that the long term impact of the Court's decision will be significant; however, the short term impacts are far less certain. The Court's holding was limited to requiring EPA to review its decision not to regulate GHG emissions from new motor vehicles. This does not necessarily accomplish petitioners' goals of requiring the EPA to affirmatively regulate these emissions.

A May 18, 2007 Congressional Research Service Report for Congress recognized that should EPA make the endangerment finding, the agency might set voluntary standards or standards that must be complied with only after the President certifies that developing nations have put adequate GHG emission limits into effect as well. It does appear, according to the Report, that EPA will make the prerequisite finding of endangerment based on the President's May 14, 2007 request that the EPA Administrator have Clean Air Act regulations limiting vehicle GHG emission in place by the end of 2008.

The CRS Report also noted two other significant impacts likely to result from the Court's decision. First, the majority's finding of standing will be important to the fortunes of plaintiffs in other climate change litigation. The key issue in the future regarding standing will be whether the Court interprets its standing finding in *Massachusetts* to be contingent on the existence of a state petitioner and the presence in the Clean Air Act of an explicit provision permitting the filing of administrative petitions. Second, the Court's ruling increases the likelihood of litigation seeking to have EPA restrict GHG emissions from stationary sources, like coal-fired power plants and factories. The stationary sources provisions of the Clean Air Act use strikingly similar terms to those of Section 202.[4]

An amicus of the court in *Massachusetts*, David Rivkin, Jr., posted to a discussion board on the Supreme Court of the United States Blog, also noting that one of the significant impacts of this case will be the ease of states to establish standing in the future based on the new rules established in the majority opinion that grant states "special solicitude." However, this posting also indicated that the bottom line impact of the decision is likely to be quite limited as it is unclear whether the EPA will come to the conclusion desired by the petitioners. The amicus recognized that EPA could, for example, conclude that more greenhouse gases would be emitted by automobiles and other sources around the world if EPA regulated unilaterally and unconditionally because the Executive would lose leverage in negotiating a multilateral solution to climate change concerns.

An April 9, 2007, article from *The Jurist* written by former EPA General Counsel Ann Klee, predicted that the Court's foray into the field of public policy will have no impact in terms of reducing global GHG emissions and therefore no effect on global climate change. According to this article, addressing an infinitesimal percentage of GHG emissions from new cars in the United States will not solve the complex, global problem. Klee concluded that this would solution would export domestic industries and jobs to developing countries, resulting in increased GHG emissions and climate change, and was therefore, no solution at all.

Although it seems nearly certain that the opinion in *Massachusetts v. EPA* will initiate further efforts to control GHG emissions, it is too early to say whether or not there will be any immediate significant impacts flowing from the decision. Most experts seem to believe that the deference granted to the EPA from the opinion will stall any instant regulations, limiting the immediate impact this opinion will have on the issue of GHG emissions and the global climate.

4 For example, "air pollutant", "in his judgment", and "may reasonably be anticipated to endanger public health and welfare."

Bell Atlantic v Twombly *(continued)*

trary to the ILECs' apparent economic interests.

The Second Circuit reversed, holding that the District Court applied the wrong standard in assessing the parallel conduct claim. Invoking *Conley,* the Second Circuit found the allegations of parallel conduct, coupled with plaintiffs' bare assertions of an agreement, sufficient to state a plausible claim of conspiracy.

The Commonwealth of Virginia and 15 states were among those submitting briefs urging the Court to reverse the Second Circuit. In the long-term, the States argued, allowing the decision to stand would risk a weakening of the already low threshold for notice pleading.

In a decision authored by Justice Souter, the Supreme Court reversed and remanded. Seven Justices held that stating a § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[6]

Seven Justices held that stating a § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.

The duty to include such facts, the Court explained, is not inconsistent with notice pleading and Fed. R. Civ. P. Rule 8, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."

The duty to include such facts, the Court explained, is not inconsistent with notice pleading and Fed. R. Civ. P. Rule 8, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests. Nonetheless, the need at the pleading stage for "allegations plausibly suggesting (not merely consistent with) agreement" reflects the threshold requirement of Rule 8(a)(2) that the plain statement "possess enough heft" to show that the pleader is entitled to relief.[7] The Court characterized the dissent's contrary view of Rule 8(a)(2) as "greatly oversimplifie[d]," adding that "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."[8]

The Rule 8 entitlement requirement has practical significance, the Court explained. It combats *in terrorem* complaints by exposing basic deficiencies at the point of minimum expenditure of time and money by the parties and courts. "Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim."[9]

Nor did the Court consider a "plausibility standard" at the pleading stage inconsistent with *Conley.* According to the majority, an oft-cited passage from *Conley* – that to warrant dismissal "a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism was the product of collusion rather than coincidence"[10] – had long been taken out of context and was best forgotten. Rather than establishing a minimum standard of adequate pleading, the Court stated, *Conley* instead "described the breadth of opportunity to prove what an adequate complaint claims."[11]

After dispatching *Conley,* the Court turned to the complaint itself. The claim of conspiracy in restraint of trade, it found, came up short because "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[12] The parallel conduct could be explained as the "natural, unilateral reaction of each ILEC intent on keeping its regional dominance," while a "natural explanation" for the alleged non-competition "is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."[13] Finding that the complaint lacked facts to state a claim to relief plausi-

— *continued on next page*

6 *Twombly* at 9.
7 *Id.* at 10.
8 *Id.* at 8, fn. 3.
9 *Id.* at 13, citing *Dura Pharmaceuticals, Inc. v. Broudo*. 544 U.S. 336, 347 (2005).
10 *Conley, supra,* 355 U.S. at 45-46.
11 *Id.* at 16-17.
12 *Id.* at 19.
13 *Id.* at 19, 21.

Bell Atlantic v Twombly *(continued)*

ble on its face, the Court concluded that it must be dismissed.

Justice Stevens, joined in relevant part by Justice Ginsburg, dissented, finding the majority's plausibility standard irreconcilable with both Rule 8 and the Court's governing precedents. According to the dissent, plausibility is a matter of proof, not pleading, and is appropriately relegated to other stages of the trial process. Indeed, "[e]verything today's majority says would . . . make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described."[14]

Although the Court denied it was requiring a heightened fact pleading of specifics, the dissent had a "difficult time understanding [the majority's] opinion any other way."[15] The dissent also questioned the majority's use of *Twombly* as the vehicle for a new pleading rule, given the Court's prior recognition that in antitrust cases proof of agreement "is largely in the hands of the alleged conspirators" and, consequently, dismissals prior to "ample opportunity for discovery should be granted very sparingly."[16]

Correctly or not, the *Twombly* decision is being cited by district courts in support of heightened pleading requirements in cases other than antitrust. In *Hicks v. Ass'n of Am. Med. Coll.,* 2007 WL 1577841 (D.D.C. May 31, 2007), the District Court for the District of Columbia applied *Twombly's* plausibility standard in a wrongful discharge case. The court, which described *Twombly* as "rejecting the traditional 12(b)(6) standard set forth in *Conley*," dismissed the complaint's first two counts after determining that the plaintiff "failed to provide any facts that would meet the plausibility standard set forth in [*Twombly*]." *See also Horton v. Williams*, 2007 WL 1575974 (M.D. Ala. May 30, 2007) (applying the *Twombly* plausibility standard in a constitutional civil rights case); *but cf. Erickson v. Pardus*, 551 U.S. ____ (2007) (*per curiam*) (Reversing the 10th Circuit, which affirmed dismissal of a § 1983 civil rights complaint on the grounds that plaintiff's conclusory allegations failed to state a claim; review granted because the decision "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure.")[17]

14 Dissent at 17.
15 Dissent at 19.
16 *Twombly* at 17-18, citing *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976).
17 Available at http://supremecourtus.gov/opinions/06pdf/06-7317.pdf

Wind Farm *(continued)*

impact up on the reliability of electric service and would have a positive economic development benefit to the Commonwealth. In evaluating the public interest, without consideration of the environmental issues (which were addressed separately), the Hearing Examiner found that the project met the statutory requirements and was not otherwise contrary to the public interest. With respect to the environmental issues, the Hearing Examiner considered avoided emissions, risks to bats, risks to birds, and risks to other endangered species. He determined that the project represented a risk to birds and a significant risk to bats, requiring post-construction monitoring of both. Highland Wind proposed to limit the cost of the monitoring program to $2,500 per megawatt of installed capacity per year, but the Hearing Examiner agreed with The Nature Conservatory that the cost should be $4,000 per megawatt of installed capacity per year, or an annual maximum cost of $150,000.

During the proceeding, there had been dispute over which agency should have approval authority over the protocols of the monitoring program. The Nature Conservatory recommended that both the U.S. Fish and Wildlife Service and the Virginia Department of Game and Inland Fisheries ("DGIF") approve the monitoring plan. In contrast, Highland Wind argued that DGIF would have sole approval authority and that there would only be a 30-day review period. While the Hearing Examiner agreed with Highland Wind that it only needed to obtain DGIF approval, he noted that "this Commission should stand ready to resolve any disputes that may arise between DGIF and Highland Wind."[1] The Hearing Examiner also found that Highland Wind and DGIF should be allowed to develop their own monitoring plan and mitigation measures, with the Commission deciding any disagreements. Finally, the Hearing Examiner recommended that the Commission grant Highland Wind a Certificate of Public Convenience and Necessity, with a two year sunset provision.

Highland Wind, Highland Citizens, Michael A. King, The Nature Conservatory, the Commission Staff, DGIF, the U.S. Fish and Wildlife Service, and the Department of Conservation and Recreation filed comments to the Hearing Examiner's Report. On March 28, 2007, Highland Wind filed an Objection to the comment letters of DGIF, the U.S. Fish and Wildlife Service and the Department of Conservation and Recreation on the basis that none of the agencies were parties to the proceeding and thus did not have the authority to file comments.

On March 7, 2007, Highland Citizens filed a Motion for

Stay based on two appeals granted by the Supreme Court of Virginia[2] that Highland Citizens argued would affect the Commission's review of the Application. Specifically, the cases dealt with the conditional use permit granted to Highland Wind by the Highland County Board of Supervisors, which Highland Citizens argued the Hearing Examiner relied heavily upon in making his recommendations. Highland Wind, Michael A. King, and The Nature Conservatory filed responses in opposition to the Motion for Stay, arguing that the outcome of the appealed matters would not alter the Commission's authority. Highland Citizens filed a Reply in support of its Motion for Stay.

The Commission entered an order on April 6, 2007, remanding the proceeding to the Hearing Examiner, deferring its ruling on the Motion for Stay, and stating that it did not consider the comments to the Hearing Examiner's Report filed by DGIF, the U.S. Fish and Wildlife Service and the Department of Conservation and Recreation. The Commission determined that the risk to bats and birds was within the required statutory analysis of environmental impact and the public interest, and that all respondents should have an opportunity to participate in the determination of the proper monitoring and mitigation measures for bats and birds. The Commission directed the parties to address specific criteria including, but not limited to, the species to be protected, the role of DGIF and other agencies, reporting procedures and schedules, triggering mechanisms, and whether the Commission has the authority to permit another entity to direct operational modifications and adaptations to the plan.

Subsequently, the evidentiary hearing was held on July 17 and 18, 2007 by the Hearing Examiner. Highland Wind, DGIF, and The Nature Conservatory pre-filed testimony. Post-hearing briefs are due by the parties on August 29. Afterwards, the Hearing Examiner must issue a supplemental report for the Commission's consideration. For now, the question as to whether there will be a wind farm in Highland County, Virginia remains unanswered.

[1] Report of Alexander F. Skirpan, Jr., Hearing Examiner (March 1, 2007) at 79.
[2] *Lucile Swift Miller, et al. v. Highland county, et al.* (Record Number 062111), *Tom Brody, et al. v. Highland County, et al.* (Record Number 06249). These cases were heard by the Virginia Supreme Court during its June docket.

Web Site News

The Section's home page on the Virginia State Bar's web site now provides a helpful bit of history, reflecting past developments in state regulatory law and the Section's efforts to keep its membership apprised of those developments. A comprehensive collection of Administrative Law News dating back to 1988 can now be accessed on-line. In addition, the programs of every National Regulatory Conference can be downloaded.

The Administrative Section home page can be found at http://www.vsb.org/sections/ad/index.htm Or, if it's easier, just go to the State Bar's web site (www.vsb.org), click on "member resources," then "sections," then "administrative law."

Changes to CLEC Rules *(continued)*

Case No. PUC-2006-00154, the proposed rules would require reduced CLEC access charges by capping access rates at the highest of (a) the interstate access rates of the CLEC, (b) the aggregate intrastate access rates of the Incumbent Local Exchange Carrier(s) ("ILECs") in whose service territory the CLEC is providing service, or (c) a benchmark rate for CLECs of $0.029 for a transition period running from December 1, 2007 through March 30, 2008. The proposed CLEC Rules also incorporate additional definitions which provide CLECs with additional pricing and tariff flexibility, relax the current price ceilings and provide a transition period for CLECs to meet the new intrastate access rate requirements. The proposed CLEC Rules also allow CLECs to request pricing structures or rates that do not conform to the new rule.[2] Specifically, the amended regulations, if adopted, would change the definitions contained in 20 VAC 5-417-10 and the local exchange new entrants' regulation at 20 VAC 5-417-50.

Commission Staff's Division of Communications ("Commission Staff") filed comments to the proposed rulemaking on July 19, 2007, proposing limited revisions and noting that most of the parties are in overall agreement with the intent of the proposed CLEC Rules. The proposed revisions applicable to price ceilings, if adopted, are to go into effect beginning December 1, 2007. Formal adoption of the new rules now lies with the Commission.[3]

Background

Intrastate access rates represent compensation paid to local service providers for the use of their network by interexchange carriers and other telecommunications service providers and refer to the connection at both the originating and terminating ends of a call using the local telephone companies' switches.

Verizon's call for revised rules was premised in part in what it contends are unreasonably high access charge rates set by some CLECs and that pursuant to Va. Code § 56-235.5:1, the SCC is required to treat all providers of local exchange telephone service in an equitable fashion and without undue discrimination, and, to the extent possible, apply the same rules to all providers of local exchange services. The current rules[4] require CLECs to set rates no higher than those that an ILEC in the same service area was charging on January 1, 1996. The rules do not require a CLEC to decrease its access charge rates when the ILEC decreases its access charges, either voluntary or by Commission order. Verizon's access charges have been reduced several times in recent years, leaving CLEC access charges significantly higher than Verizon's.[5] Verizon proposed that CLECs' access charges be reduced to its own access charges and to revise the CLEC rules accordingly. Verizon further proposed that whenever access rates were modified, for whatever reason, the CLECs' would be required to make an accompanying change.

Following Verizon's filing, numerous CLECs filed notices of participation and opposed Verizon's proposed rule changes which, as proposed by Verizon, were interpreted by CLECs to be highly favorable to Verizon. Ultimately, the Commission issued its April 30, 2007 Order, which granted Verizon's application to the extent that it initiated a rulemaking to change the CLEC Rules but declined the precise changes requested by Verizon. The result is the pending rulemaking docket in Case No. PUC-2007-00033.

The Federal Communications Commission ("FCC") is currently in the process of addressing similar *inter*state access charge issues at the federal level as part of a larger review of intercarrier compensation, which was recognized in the Commission's Rulemaking Order but rejected as a reason to hold off on further action.

What's Next?

The proposed CLEC Rules were published in the *Virginia Register of Regulations* in late May of 2007 (23:19 VA.R. 3012-3019 May 28, 2007), which allows for further public comments an additional time for further Commission action and input from the Governor and Joint Commission of Administrative Rules. As of the time of writing, the proposed CLEC Rules await formal adoption by the Commission.

The proposed CLEC Rules as published in the *Virginia Register* can be found at
http://legis.state.va.us/codecomm/register/vol23/iss19/p20v5417.doc

[2] Rulemaking Order, Slip Op. at 8. *See also*, proposed amendments to 20 VAC 5-417-10 (Definitions) and 20 VAC 5-417-50 (Regulation of new entrants providing local exchange telecommunications services) as proposed in the Rulemaking Order for the rulemaking proceeding at the Commission, docketed as Case No. PUC-2007-00033. The new proposed CLEC Rules as published in the *Virginia Register* can be found on-line at:
http://legis.state.va.us/codecomm/register/vol23/iss19/p20v5417.doc

[3] Pursuant to the Commonwealth's adoption, amendment and repeal of regulations process pursuant to Article 2 (§ 2-2-4006 *et seq.*) of Ch. 40 of Title 2.2 of the Code of Virginia.

[4] The existing CLEC Rules have not been significantly revised since the changes in Case No. PUC-2002-00115 were approved on April 9, 2003

[5] See, e.g., AT&T Communications of Virginia, LLC, No. PUC-2003-00091.

MEMBERS WANTED!!!

JOIN THE ADMINISTRATIVE LAW SECTION

DON'T MISS OUT ON THE BENEFITS OF MEMBERSHIP INCLUDING THIS NEWSLETTER

PLEASE ASSIST THE SECTION IN ITS MEMBERSHIP DRIVE BY FORWARDING THIS APPLICATION TO YOUR COLLEAGUES

Dues are just $20. Just mail this form, together with a check made payable to the "Virginia State Bar" to the address below.

Name: ______________________________

VSB No.: ______________________________

Firm/Employer: ______________________________

Official Address of Record: ______________________________

____

Telephone No.: ______________ Facsimile No.: ______________

Email Address: ______________________________

Mail Completed Form and $20 to:
Virginia State Bar
Attn: Membership
707 E. Main St., Suite 1500
Richmond, VA 23219

**Membership effective until June 30, 2008.
**Questions? Call the Virginia State Bar (804)-775-0500

VIRGINIA STATE BAR ADMINISTRATIVE LAW SECTION

Board Members 2007-2008

Brian R. Greene, *Chair*
SeltzerGreene, PLC
(804) 864-1100
bgreene@seltzergreene.com

Kiva Bland Pierce, *Vice Chair*
Office of Attorney General
Insurance and Utilities
Regulatory Section
(804) 786-3809
kpierce@oag.state.va.us

Vishwa Bhargava Link, *Secretary*
Dominion Resources Services
(804)819-2458
Vishwa_Link@Dom.com

James S. Copenhaver, *Immediate Past Chair*
Ni Source Corporate Services
Company
(804) 768-6408
jcopenhaver@nisource.com

Arlen K. Bolstad
Office of General Counsel
State Corporation Commission
(804)371-9671
Arlen.bolstad@scc.virginia.gov

James C. Dimitri (Jimmy)
McGuireWoods LLP
(804) 775-1115
jdimitri@mcguirewoods.com

T. Borden Ellis
Ni Source
(804) 768-6475
tbellis@nisource.com

Mark A. Keffer
AT&T
(703)691-6046
mkeffer@att.com

Renata M. Manzo
Hunton & Williams LLP
(804)788-8606
rmanzo@hunton.com

Louis R. Monacell
Christian & Barton
(804) 697-4120
lmonacell@cblaw.com

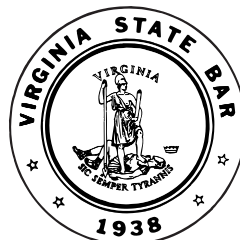
John A. Pirko
LeClair Ryan, P.C.
(804) 968-2982
jpirko@leclairryan.com

Catherine D. Huband
Liaison
Virginia State Bar
(804) 775-0514
Huband@vsb.org

Ashley Beuttel Macko, *Newsletter Editor*
Office of the Attorney General • (804) 786-5852 • amacko@oag.state.va.us

Administrative Law News

VIRGINIA STATE BAR
EIGHTH & MAIN BUILDING
707 EAST MAIN STREET, SUITE 1500
RICHMOND, VIRGINIA 23219-2800
WWW.VSB.ORG/SECTIONS/AD/INDEX.HTM



PRST STD
U.S. POSTAGE
PAID
PERMIT NO. 709
RICHMOND