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Multi-Jurisdictional Merger Investigations: A Case Study of the Equitable - Dominion Resources Transaction

By Howard Feller, McGuireWoods LLP

Editor's Note: The following article is a condensed version of a paper prepared by Mr. Feller for a CLE co-sponsored by the Administrative Law Section, Corporate Counsel Section and Antitrust Law Section at the 2008 Annual Meeting of the Virginia State Bar entitled "How to Manage Issues Surrounding Multi-Jurisdictional Investigations – A Case Study." The panelists included: David Wales, Deputy Director of the FTC's Bureau of Competition; James Donahue, Chief Deputy Attorney General for Antitrust for the Commonwealth of Pennsylvania; Howard Feller, Partner, McGuireWoods; and Mark Webb, Deputy General Counsel - Corporate Finance, Securities and Special Projects, Dominion Resources, Inc. The panel was moderated by M. Christina Floyd, Esq., Vandeventer Black LLP.

Introduction

In March 2006, Equitable Resources, Inc. and Dominion Resources, Inc. announced that they had

reached an agreement under which Dominion Resources' Peoples Gas and Hope Gas subsidiaries would be sold to Equitable. Since this transaction

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Trans-Allegheny Interstate Line: Closer to Becoming a Reality, Or Is It?

By Ashley B. Macko

In late July, the SCC Hearing Examiner issued his report recommending SCC approval of the Virginia portion of the Trans-Allegheny Interstate 500 kV Transmission line (TRAIL), also called the 502 Junction – Loudoun line.¹ The 265-mile line will begin in

southwestern Pennsylvania, travel through northern West Virginia and terminate in Northern Virginia at a cost of over \$820 million. The Virginia portion of the will be approximately 65 miles in length and travel through Frederick,

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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.

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Message from the Chair . . . Kiva Bland Pierce

The 2008-2009 Administrative Law Section bar year promises to be an exciting one! It's already off to a bang with appointment of James C. Dimitri to the SCC on August 15, 2008. Mr. Dimitri fills the vacancy left when Judge Theodore V. Morrison, Jr. officially retired on December 31, 2007. Mr. Dimitri has a unique background in administrative law having worked for the government and for private law firms. He previously was as an Assistant Attorney General in the Division of Consumer Counsel, General Counsel at the SCC, and a Staff Attorney at the Virginia Poverty Law Center. At the time of the appointment, he was a partner with McGuireWoods where he represents clients before the SCC. Additionally, Mr. Dimitri has served for numerous years on the Administrative Law Section's Board of Governors ("Board"), and we wish him the best as he begins his new role as Commissioner.

Plans are already underway for the next National Regulatory Conference ("NRC"). The NRC is jointly sponsored by our Section, the SCC, and the College of William and Mary's Marshall-Wythe School of Law. Vishwa Link of McGuireWoods has the formidable yet rewarding task of heading this year's planning committee. Under her leadership, the 27th Annual NRC will no doubt provide timely and important topics in addition to allowing Section members an opportunity to interact with each other and the Commissioners. I encourage everyone to attend the NRC, which is scheduled for May 19-20, 2009, in Williamsburg.

Borden Ellis of NiSource serves as the Section's Secretary this year. In addition to taking minutes at the Board meetings, he will coordinate a joint CLE program at the annual VSB meeting in June 2009. Stay tuned for more information on this program.

Ashley Macko of the Office of the Attorney General's Division of Consumer Counsel begins her third year as Newsletter Editor. Her past two years in that position led to regular newsletters filled with relevant and interesting articles.

This year promises to have the same degree of reliability with the publication of this first newsletter. If you missed a newsletter, most of them are archived on our Section's website at <http://www.vsb.org/sections/ad/index.htm>.

We plan to sponsor at least one Brown Bag luncheon this spring. As the Immediate Past Chair, Brian Greene of SeltzerGreene, PLC, has the pleasure of organizing that event. Brian served the Section well during his tenure, most notably overseeing the program for the silver anniversary of the NRC.

The Section is here to serve you! We want the Section activities and publications to enhance and benefit your practice. If you have a suggestion or a concern, please feel free to contact me at 804-786-3809 or kpierce@oag.state.va.us.

I would like to thank last year's NRC planning committee for assisting me in organizing the 26th NRC. Everyone's hard work and determination led to a successful program, and I truly appreciate the efforts. I would also like to thank our Virginia State Bar liaison, Catherine Huband, for her assistance throughout the year and for answering all of my many questions.

I look forward to this year, not only because of the exciting programs, but also because of the camaraderie that exists among our members. I have often thought that our Section is one of the finest around, and it is an honor to serve as Chair this year. I hope to see each of you at the various Section events throughout the year! ✱

About the Chair: Kiva Bland Pierce is an Assistant Attorney General in the Insurance and Utilities Regulatory Section. After receiving her J.D. from the University of Richmond, T.C. Williams School of Law in 2001, she clerked at Henrico Circuit Court. Her undergraduate degree comes from Louisiana State University.

Demand Response: Now More than Ever?

By Kenneth A. Barry

Proverbially, there is nothing new under the sun, and “demand response” is a case in point. Industrial customers have, for many decades, contracted with utilities for at least a portion of their loads to be curtailed first – averting the need for broader system interruptions – in exchange for a discount on the demand charge. Moreover, the idea of incentivizing large numbers of small customers to conserve or curtail as a tool for grid management – an alternative to building ever more costly infrastructure to get through peaks – has been in play since at least the early 1980s.

Despite this long legacy, the concept has undergone a striking repopularization in the last several years. Though its cousins “conservation” and “Demand Side Management”¹ were certainly voguish in the recent past, demand response has morphed into a veritable Swiss Army Knife of market design tools — appealing to energy policymakers for its potential to (a) reduce the need to construct more generation, transmission, and distribution infrastructure to meet peaks consistent with reliability criteria; (b) tame short-term market power of generation wholesalers (*i.e.*, price spikes) when demand soars; and (c) reduce greenhouse gas emissions in a carbon-constrained environment, by either curbing net consumption or shifting it to times when more efficient and less polluting units carry the load.²

This article will explore several of the dynamics underlying the revival of interest in demand response and the challenges that lie ahead. But first, a disclaimer: the swirl of issues nowadays enveloping the design and deployment of demand response is becoming so complex that a book-length treatise would scarcely do it justice. Among the significant, interlocking issues raised are (1) system reliability impacts; (2) market efficiency and market power; (3) measurement, verification, and valuation; (4) enabling information technology and infrastructure; (5) designing appropriate rate incentives to optimize end user participation; (6) utility financing, risks, and rewards; (7) controlling “gaming” by participants; (8) public education; and (9) federal/state jurisdiction. We will touch on most of these issues, but focus on just a few.

Forces behind new zeal for demand response. A short

list of the main drivers might well begin with concerns about the performance of competitive energy markets in the United States. Restructured, competitive markets were ushered in during the late 1990s, from Maine to California,³ with expectations that generators would be climbing over each other to serve loads at lower costs and in innovative ways. But advocates for competition — in lieu of traditional, regulated, cost-based rates — did not anticipate a swift tripling of prices for natural gas (generally the incremental fuel for both short-term dispatch and long-term planning) along with a steady march of increases in other fuels; nor, perhaps, did they fully realize how the bid-based “spot” energy markets organized by RTOs and ISOs — which clear for *all* suppliers at the price of the highest single bid necessary to meet hourly system demand — would tend to prop up lofty prices during peak hours and seasons, in conjunction with those unexpectedly

Elevated market-clearing prices, when viewed as “market signals,” are music to the ears of many economists, but even those economists acknowledge that efficient markets require some elasticity of demand... And therein lies the rub.

rich fuel costs. Elevated market-clearing prices, when viewed as “market signals,” are music to the ears of many economists, but even those economists acknowledge that efficient markets require some elasticity of demand. Absent that counterweight, suppliers are able to squeeze customers so long as the supply-demand balance remains tight.

And therein lies the rub. First, electricity is not a commodity customers readily forego when prices turn high; and second, the rate caps typically built into state-developed competitive market transition plans sheltered retail customers for

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¹ “DSM” was embraced, to varying extents, by many state regulatory commissions over this period. The term encompassed programs designed both to conserve consumption around the clock *and* (as “demand response” emphasizes) to reduce loads when capacity is most stressed. DSM tended to lose some favor over time, receiving criticism as bureaucratic and costly to ratepayers in relation to benefits obtained.

² Note, however, that getting carbon emission reductions from load *shifting* is dependent on the system configuration at the time of the curtailment. If more efficient gas units or baseload nuclear or hydro units pick up shifted consumption, then carbon emissions would be reduced; but if the result is merely a shift from gas-fired peakers to less costly baseload coal units, then emissions reductions do not follow.

³ Wholesale competition has occurred everywhere, due to FERC’s adoption of “open access” transmission in 1996, but *retail* competition exists only where states have adopted it. These are typically states served by RTOs and ISOs on the whole-

years from the high and volatile energy marketplace, even if local utilities – as exemplified by the calamitous California market of 2000-2001 — experienced significant wholesale price increases in the changeover to competitive energy markets.⁴ This sheltering phase was counterproductive to developing a culture of conservation.⁵

Close on the heels of the inelasticity problem was the paucity of so-called “smart” metering at customer sites. More formally called “Advanced Metering Infrastructure” (AMI), smart metering – which informs customers of current price levels and records their response, if any — existed only in large, electrically sophisticated industrial or commercial facilities, and perhaps a smattering of homes and business that opted for “time-of-use” rates. Without meters in service providing transparency and feedback on approaching market prices and customer reactions, demand response is a largely theoretical construct.⁶

Last, but not necessarily least, among explanations for the quickening interest in demand response is the inexorable rate of load growth across most of the country, eroding reserve margins that looked stout earlier in this decade. With lagging transmission infrastructure development and plenty of generation retirements on the horizon – and with significant doubts what types of new units should be built and who would build them⁷ – a heightened ability to selectively curtail the loads of voluntary program participants becomes an attractive alternative “resource.” In this light, demand response is valued as a reliability tool as much (if not more) than as an antidote to high energy costs or market power. Moreover, the encouragement of demand response is one of those rare energy issues capable of uniting diverse groups more commonly seen butting heads: large customers, small customers, load-serving utilities, regulators of all persuasions, and environmentalists.

Cheerleaders and breakthroughs. In the last several years, demand response as a “resource” has not lacked for vocal champions – a necessity, given the paradigm shift required – beginning with the Federal government. In the omnibus energy legislation known as EPAct 2005, Congress required the DOE and FERC to conduct studies on demand response potential within a year of enactment and required state commissions to “consider” time-based rate schedules within 18 months. Even as these reports began to be churned out (FERC has issued two comprehensive studies, the latest in September 2007), Congress came back with new directives, contained in the Energy Independence and Security Act (EISA) of 2007 (passed last December), requiring FERC to

produce, in 18 months, a “National Assessment and Report” with policy recommendations on the potential of demand response, to be followed a year later by a “National Action Plan.”⁸

FERC has been particularly zealous in pushing demand response to the forefront, with Commissioner Jon Wellinghoff stepping up as the “point man.”⁹ FERC’s comprehensive 2006-07 revision of its standardized tariff for open access transmission, contained in Orders 890 and 890-A, reveals a preoccupation with enabling demand response to compete at eye-level with generation resources in supplying the energy and ancillary service markets. The cited law journal article co-authored by Commissioner Wellinghoff takes an aggressive jurisdictional stance, espousing several theories on how FERC might lawfully impose *retail* rate designs that make consumers feel the ups and downs of market prices – a linkage he sees as vital to making FERC’s wholesale market realm function in a “just and reasonable” fashion. However, following his sweeping claims of FERC’s jurisdiction, Wellinghoff proposes a truce between dueling Federal and state regulators, so that their “overlapping” authorities respecting market structures and retail rate design may be exercised in a coordinated fashion. To that effect, he notes

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⁴ While competitively restructured wholesale and retail markets are the most affected by high fuel costs and “scarcity”-driven price spikes, conventional markets under cost-based regulation are not entirely immune. Less efficient peaking units drive up average production costs, and few vertically integrated utilities can exist without occasional resort to the wholesale, competitive market for some services.

⁵ Since most economists expected prices to *fall* as a result of competition, it was something of a surprise that the rate caps became a critical “firewall” to protect retail customers.

⁶ In a near-emergency situation, system operators can and do broadcast requests for voluntary conservation, with some positive results; but this does not, obviously, create the technical foundation for a meaningful and sustainable demand reduction program.

⁷ Natural gas, the fuel technology of choice from the early 1990s, has lately been clouded by the arrival of gas higher prices. Coal-fired unit growth has been nearly paralyzed by fears of carbon emissions and the impact of legislatively mandated carbon taxes (or the equivalent). Nuclear development casts its own shadows, in terms of long lead-times, high construction costs, technological and financing uncertainties, and some lingering environmentalist opposition. Renewable energy sources, such as wind projects, have proceeded apace but cannot be expected to solve the whole impending shortage. Moreover, as to the question of *who* builds, in states that have abandoned the traditional regulated monopoly model, system planners must depend on “the market” to step forward, in a time of economic uncertainty.

⁸ Section 529, EISA of 2007. The “National Plan” does not Federalize the subject, but rather envisions technical and educational support to state implementation efforts. Sections 1302-09 of EISA also require the DOE to study and report to Congress on the potential for implementing “smart grid” infrastructure – including demonstration projects and Federal financial contributions to utility implementation efforts.

⁹ See Wellinghoff and Morenoff, *Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Market Equation*, 28 *Energy Law Journal* (Vol. 2) 389 (2007) (stressing the indispensable role of demand response in making wholesale energy and ancillary services markets efficient and the no less indispensable role of FERC in making that happen, even if it entails imposing rate design reform at the local, retail level).

The Future of Nuclear Waste in Virginia and the United States

By Joshua Fix

Nuclear energy already accounts for approximately 36% of Virginia's electric power generation mix.¹ The recent rise in the cost of coal, oil, and natural gas, as well as environmental concerns stemming from the use of fossil fuels, further increases the appeal of nuclear to supply Virginia's growing energy needs. It is very likely that Virginia will become even more dependent on nuclear power in the future. With that in mind, the Commonwealth may have a greater stake in the outcome of the current debate on Yucca Mountain and spent nuclear fuel reprocessing than it might initially appear.

Yucca Mountain is part of the nuclear test site in the desert of Nye County, Nevada. During the 1980's Congress began examining several potential locations for a national nuclear waste storage site. By 1987 Yucca Mountain was the favored location for such a facility, but due to opposition in Congress, from the Governor of Nevada, and from various lobbying groups, the facility's opening has been significantly delayed. Opposition to the facility has focused on the potential for geological shifting to release waste into the local environment and the concern that transportation of the waste could similarly risk a radioactive leak in the event of an accident. Originally scheduled to begin accepting waste in 1998, Yucca Mountain is still not operational.

In the next few months the Nuclear Regulatory Commission ("NRC") will hold hearings on the licensure of the Yucca Mountain deep geological repository.² At this time, there is no official date set for opening the facility. While Yucca Mountain is on the other side of the country, its licensure and operation has the potential to significantly impact Virginia. According to the Department of Energy, ("DOE") Virginia is the seventh most reliant state upon Nuclear Energy,³ and temporary home to 2,200 metric tons of spent nuclear fuel.⁴

Spent nuclear fuel consists of fuel assemblies (long, thin containers) filled with highly radioactive heavy-metals (mostly uranium) that have lost most of their fissionable material. Spent fuel assemblies are removed from the reactor and temporarily stored in cooling pools, where the metal literally cools

down, and also loses some of its radioactivity. When a cooling pool runs out of space, the oldest spent fuel assemblies are removed and stored in "dry casks." Dry casks are large structures made of concrete, steel, and lead, designed to contain the dangerous radiation of the spent fuel. Half of Virginia's spent nuclear fuel is currently in dry-cask storage.

If Yucca receives its license from the NRC, spent nuclear fuel such as that stored in Virginia could eventually

be transported to the facility for permanent storage. The Department of Energy estimates the Yucca will not be prepared to receive nuclear waste until 2017 at the earliest.⁵ By that time the U.S. will likely have produced more waste than the 70,000 metric tons Yucca is currently allowed to handle by statute.⁶ While the statutory cap on Yucca's capacity could theoretically be increased, such an attempt would likely

set off another drawn-out regulatory battle relating to the safety of the site.

Spent fuel reprocessing presents an alternative to the current practice of a once-through fuel cycle, immediately followed by deep geological storage. The once-through fuel cycle involves using nuclear fuel until it is no longer "burnable," then committing the waste product to storage. Reprocessing spent fuel allows a portion of the fuel to be

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¹ *Virginia 2007 Electric Generation Mix*, http://www.ocrwm.doe.gov/info_library/newsroom/photos/pdf/virginia.pdf (last visited July 22, 2008).

² *NRC Docketing Review and Hearing Opportunity Schedule*, <http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app.html#appreviewschedule> (last visited July 22, 2008).

³ *Waste Locations by State*, http://www.ocrwm.doe.gov/info_library/newsroom/photos/photos_natlmap.shtml (last visited July 22, 2008).

⁴ *Id.*

⁵ *Current Storage Methods for Radioactive Waste*, http://www.ocrwm.doe.gov/ym_repository/about_project/waste_explained/storage.shtml (last visited July 22, 2008).

⁶ *Spent Nuclear Fuel Storage Locations and Inventory*, <http://www.ncseonline.org/nle/crsreports/04dec/RS22001.pdf> (last visited July 22, 2008).

State Corporation Commission Approves Coal-Fired Plant to be Built in Wise County

By Ashley B. Macko

On March 31, 2008, the Commission approved construction of an \$1.8 billion, 585 MW coal-fired generation plant to be built in southwest Virginia's Wise County by Dominion Virginia Power.^{1, 2} The proceeding was the first considered under Virginia Code § 56-585.1, a new statute resulting from legislation which ended capped electric rates, effective December 31, 2008, and provides a new framework for the regulation of electric utilities in the Commonwealth. The application involved the construction of a plant pursuant to § 56-585.1 A 6 (i), "a coal-fueled generation facility that utilizes Virginia coal and is located in the coalfield region of the Commonwealth . . . regardless of whether such facility is located within or without the utility's service territory . . ." The statute explicitly provided that "[t]he construction of any facility described in clause (i) is in the public interest, and in determining whether to approve such facility, the Commission shall liberally construe the provisions of this title."

The application raised a number of novel issues under the new legislation, including application of a new methodology to determine return on equity ("ROE") based on traditional methodologies, but now subject to a cap and floor based on the returns of a statutorily-defined peer group. It also applied enhanced return on equity treatment provided for under § 56-585.1 and addressed the appropriate level of Commission review with the legislation's explicit finding that this type of plant was in the public interest. One party also challenged the constitutionality of the statute under the Commerce Clause as favoring Virginia coal and discriminating against out-of-state and foreign coal suppliers.

Numerous parties intervened in the proceeding and filed testimony, including the Office of the Attorney General, Division of Consumer Counsel, the Virginia Committee for Fair Utility Rates, and the Southern Environmental Law Center. At the public hearing, 121 public witnesses appeared and offered testimony, both supporting and opposing the proposed plant. Public witnesses opposing the plant generally did so for environmental and health reasons and those favoring construction cited the economic benefits to tax base and additional employment in southwest Virginia.

Following the evidentiary hearing, several parties, including Dominion Virginia Power, Commission Staff and Consumer Counsel, filed a Joint Stipulation recommending

the Commission approve the plant, subject to certain parameters involving return on equity issues.

The Commission's Final Order was issued March 31, 2008, within the nine month period allowed under the statute.

I. The Public Interest and Prudence

In light of the public interest determination provided in the statute, the Commission found that it had no discretion to find that the plant was inconsistent with the public interest. The Commission did find that § 56-585.1 D preserved the Commission's authority to determine the prudence of any costs projected or incurred in connection with the coal plant. The Virginia Committee for Fair Utility Rates had urged the Commission to deny full recover of the cost of the plant on the grounds that not all costs were prudently-incurred. The Commission, however, rejected the notion that prudence equated to a least cost option: "the Company does not need to establish that the Coal Plant is the least cost option in order for us to conclude that the total level of currently projected costs is reasonable or prudent . . ."³

Based on evidence including project cost reports, bid comparison reports, the fixed-price contract and operations update, the Commission found the cost estimates reasonable at the projected level of \$1.8 billion: "The reasonableness and prudence of the total cost estimate, in conjunction with the proven track record in commercial use of this type of facility, has been sufficiently established by the record."⁴ The Commission rejected the argument that the project was imprudent because of greater congestion and transmission costs resulting from locating the facility outside the Company's service territory and the relative costs of the project

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¹ See *Application of Virginia Electric and Power Company for a certificate of public convenience and necessity to construct and operate an electric generation facility in Wise County, Virginia, and for approval of a rate adjustment clause under §§ 56-585 .1, 56-580 d, and 56-46.1 of the Code of Virginia*, Case No. PUE-2007-00066, Final Order (March 31, 2008).

² The location is outside the certificated service territory of Dominion Virginia Power.

³ Final Order, p. 12.

⁴ Final Order, p. 11.

2008 General Assembly Enacts Natural Gas Conservation and Ratemaking Efficiency Act

By James S. Copenhaver

The 2008 Session of the Virginia General Assembly enacted the Natural Gas Conservation and Ratemaking Efficiency Act, Virginia Code §§56-600 *et seq.* (the “Act”), which is intended to more closely align the interests of natural gas utilities, their customers, and the Commonwealth of Virginia’s public policy objectives relating to conservation and energy efficiency. The Act provides a framework for natural gas utilities to file for and obtain Virginia State Corporation Commission approval of Conservation and Ratemaking Efficiency (“CARE”) Plans.

A CARE Plan is required to include (1) a decoupling mechanism, (2) one or more cost-effective conservation and energy efficiency programs, (3) a normalization component that removes the effects of weather from the determination of conservation and energy efficiency results, (4) provisions to address the needs of low-income or low-usage residential customers, and (5) provisions to ensure that rates and services to non-participating classes of customers are not adversely impacted. A CARE Plan may apply to one or more residential, small commercial or small general service classes of customers but may not apply to large commercial or large industrial classes of customers.

Decoupling mechanisms separate or “decouple” the recovery of a utility’s allowed distribution revenue from the level of consumption of natural gas by its customers. Decoupling mechanisms thus remove the incentive under traditional rate designs for natural gas utilities to promote increased consumption in order to increase profits. Moreover, decoupling mechanisms remove the disincentive for utilities to encourage reduced consumption through conservation and energy efficiency initiatives. Decoupling may be achieved through a variety of mechanisms such as a sales adjustment clause¹, a straight fixed variable rate design², or a similar mechanism that substantially decreases the relative amount of nongas distribution revenue affected by changes in per customer consumption of gas.

The cost-effective³ conservation and energy efficiency programs to be included in a CARE Plan must be designed to either decrease the average customer’s annual, weather-normalized consumption or total gas bill (for gas and nongas elements combined), or avoid energy costs or consumption the customer would otherwise incur.

A utility will be permitted to recover all of its incremental costs associated with cost-effective conservation and energy efficiency programs that are designed to encourage the reduction of

annualized, weather-normalized natural gas consumption per customer. In addition, a utility will be entitled to recover a performance-based incentive for delivering conservation and energy efficiency benefits. The incentive is to be included in the utility’s purchased gas adjustment mechanism. The incentive is to be calculated as a reasonable share of the independently verified net economic benefits⁴ created by the utility’s cost-effective conservation and energy efficiency programs. In structuring the incentive, a utility is to be afforded a reasonable opportunity to earn up to a 15 percent share of such independently verified net economic benefits upon meeting target levels of benefits set forth in a CARE Plan approved by the Commission.

A CARE Plan may be approved within or independent of a rate case proceeding. The Commission is required to approve or deny an initial application for a revenue neutral⁵ CARE Plan within 270 days (approximately 9 months) of the filing of an application if the Plan allocates per-customer fixed costs on an intra-class basis according to a class cost of service study filed with the Plan, when such Plan is filed in conjunction with a rate case using the cost of service methodology set forth in § 56-235.2 or a performance-based regulation plan authorized by § 56-235.6. The Commission is required to approve or deny an initial application for a revenue neutral CARE Plan within 180 days (approximately 6 months) if the Plan allocates annual per-customer fixed costs on an intra-class basis in reliance upon a previously performed revenue study or class cost of service study supporting the rates in effect at the time the Plan is filed. The Commission is required to approve or deny an application for an amendment to a previously approved CARE Plan within 120 days (approximately 4 months). The Act also prescribes time periods for Commission review of CARE Plans that are refiled within 60 days following the denial of an application.

Virginia Natural Gas, Inc. filed the first application for approval of a CARE Plan under the Act on July 3, 2008. That application is currently pending before the Commission in Case No. PUE-2008-00060. ✱

About the author: James (Jim) S. Copenhaver is Lead Counsel with NiSource Corporate Services Company where he represents Columbia Gas of Virginia before the SCC. Jim is a past Chair of the Administrative Law Section of the Virginia State Bar.

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2008 National Regulatory Conference Keynote Address: How to Decarbonize While Providing Affordable Energy

By Cliona Mary Robb

The theme of the 26th National Regulatory Conference held in May 2008 was *Regulation and Technology? A Scientist, an Economist, and a Regulator Walk into the Virginia State Bar*. All jokes aside, you know you have a successful conference when one of the folks involved in vetting the materials for next year's conference suggests addressing the exact same topics and just using some new speakers.

The Honorable James Yancey Kerr, II, who previously served as Commissioner of the North Carolina Utilities Commission and on the Board of Directors of the National Association of Regulatory Utility Commissioners ("NARUC") and recently joined McGuire Woods Energy Policy Practice on September 1, 2008, is one speaker who will be a very hard act to follow. In his keynote address to the NRC, he crystallized the major challenge facing the United States: how to de-carbonize while providing affordable energy. The real issue is that misinformed passions are not keeping pace with technology. Commissioner Kerr noted that there are four basic facts we can't ignore:

- (1) electricity use continues to increase
- (2) the public will not stand for unreliable service
- (3) cost matters
- (4) environmental impacts must be factored in.

Realistically, increasing energy efficiency and the use of renewable energy won't be enough: baseload solutions like nuclear and clean coal will also have to be utilized. Imposing caps too soon, before technology has matured, will really amount to a carbon tax that will create immediate rate shock and will not solve anything. In fact, it will make the situation worse because it will increase costs and divert money that could be better spent developing new technologies. The critical part of the equation is providing a transition period for technology to develop cost effective, lower carbon solutions. Decarbonizing while providing affordable energy is all about technology: this is the point where everyone involved in the debate should agree.

What some folks fail to recognize is that the current situation is far different from the constraints imposed on SOx

and NOx emissions from power plants: when those emission constraints were imposed, technology existed for reducing such emissions, so there was a real choice between paying the penalties or investing in equipment to reduce the emissions.

This difference really matters: the Energy Information Agency has estimated that de-carbonizing will cost between \$980 billion to \$2.8 trillion in gross domestic product (GDP) losses by 2050. Commissioner Kerr believes that is a gross understatement: the Environmental Protection Agency's estimates of \$2.5 trillion in losses by 2030 and \$5 trillion in losses by 2050 are much more realistic.

The strength of this year's NRC program was also evidenced by Commissioner Kerr's sticking around for the other panels and offering comments from the back row of the lecture room. During one session, he said that it's vital that the technology horse must be in front of the regulatory cart. In essence, we need a Manhattan Project-type approach that will pour resources into technology for 10 to 15 years before carbon constraint legislation truly kicks in.

The NRC concluded with the traditional two hours of ethics CLE, which featured administrative law jeopardy with a musical interlude by Jim McCauley from the Virginia State Bar and Jim Guy from LeClair Ryan. Who knows how the 2009 NRC will top that? Maybe we'll be treated to a dance routine.

Kudos to Conference Chair Kiva Pierce and the entire NRC Program Committee on presenting an informative conference sparked by lively debate. Vishwa Link, the Conference Chair for the 2009 NRC, will have a tough act to follow, but we know she's up to the challenge, especially with input from members of the Administrative Law Section.

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APCo IGCC Facility Denied

(PUE-2007-00068)

By Kiva Bland Pierce

On July 16, 2007, Appalachian Power Company (“APCo”) filed an application seeking approval of a rate adjustment clause to recover the costs for the construction of a 629 MW integrated gasification combined cycle (“IGCC”) electric generation facility. APCo asserted that it required additional baseload generation facilities by 2012 and that IGCC technology was the best choice to meet its need. An IGCC facility is the result of the combination of two technologies: coal gasification and combined cycle power generation. This was the first application filed in Virginia pertaining to an IGCC facility.

APCo proposed to build the facility in Mason County, West Virginia, next to its Mountaineer generation station.¹ Because APCo serves customers in Virginia and West Virginia, the Company could recover the jurisdictionally proportioned construction cost of the facility from Virginia customers, including financial carryings costs, and construction work in progress costs, pursuant to Virginia Code Section 56-585.1.A.6. The Commission Staff and four respondents participated in the proceeding. The four respondents were the Old Dominion Committee for Fair Utility Rates (“Old Dominion Committee”), the VML/VACo APCo Steering Committee, Wal-Mart Stores East, LP, and the Division of Consumer Counsel of the Office of the Attorney General (“Consumer Counsel”).

The hearing took place February 12-15, 2008, where there was much debate regarding the need of the facility, the ultimate cost of the facility, and the practicability of IGCC technology, especially given the performance assumptions incorporated by APCo in its application. APCo estimated the cost of the facility to be \$2.23 billion, of which Virginia customers would pay approximately \$1 billion (not including construction financing costs). APCo’s cost projection was based on a November 2006 estimate. APCo asserted that it selected IGCC technology because it had better carbon dioxide emissions than a conventional coal plant. APCo also argued that an IGCC facility could actually capture carbon dioxide so that if federal legislation was passed regarding the removal of carbon dioxide, the facility would require less expensive retrofits than a conventional coal plant.

Other parties questioned APCo’s assertions. They argued that the estimate was outdated and that the ultimate cost of the facility would be much higher, making it imprudent for the facility to be constructed. One reason

that the respondents argued that the cost estimate was too low was that it did not include costs for adding carbon capture technology or sequestration technology onto the facility. In addition to the high cost, respondents argued that the unsubstantiated performance assumptions employed by APCo in its application and APCo’s available alternatives to meet its asserted need made the choice of IGCC technology unreasonable.

The Commission entered an order denying APCo’s application on April 14, 2008, finding that the construction of the IGCC facility was neither reasonable nor prudent. The Commission determined that it could not approve the construction with the cost uncertainties highlighted in the record and further that to do so would be to approve a blank check for the facility. Additionally, the Commission found that uncertainty existed with IGCC technology, especially on the scale proposed by APCo. Because it concluded that the facility was not prudent or reasonable, the Commission did not address the issue of APCo’s need of new generation facilities.

APCo filed a Petition for Reconsideration and/or Rehearing on April 29, 2008. APCo alleged five reasons that the Commission should reconsider its order: (1) the Commission ignored the Commonwealth’s Energy Plan, (2) the Commission made no finding on the threshold issue of need for new generating facilities, (3) the denial on the basis of cost uncertainties was inconsistent with the Commission’s recent order approving the Dominion Virginia Power Wise County coal plant (Case No. PUE-2007-00066) (“DVP Plant”), (4) the ruling created an unreasonable standard for cost estimate certainty that could not be satisfied in the present case, in addition to ignoring the evidence in the record, and (5) the Commission ignored, and thus nullified, the West Virginia approval of the facility² (and the West Virginia’s determi-

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¹ Since the facility was to be constructed in West Virginia, APCo filed an application for a certificate of public convenience and necessity (“CPCN”) with the Public Service Commission of West Virginia (“West Virginia PUC”) on January 11, 2006 (Case No. 06-0033-E-CN).

² On March 6, 2008, the West Virginia PUC entered an order approving the construction of the IGCC facility. It granted APCo a CPCN with certain conditions, including a five year sunset provision.

nation on need of the facility and viability of IGCC technology).

After addressing the five issues raised by APCo, the Commission denied the Petition for Reconsideration in its order issued May 29, 2008. First, the Commission noted that the statutory language³ describing the scope of the Commonwealth's Energy Policy, in its own terms, did not provide for the policy to override statutory standards governing the Commission's review of APCo's application. Secondly, the Commission reiterated that a determination of APCo's need for new generation facilities was unnecessary since the Commission found that the construction of the plant was not reasonable or prudent. Though the Commission did not analyze all the differences between the DVP Plant and the APCo IGCC facility, it did point out that the General Assembly made a policy decision with the new legislation that a facility being constructed in Virginia and using Virginia coal, such as the DVP Plant, was "in the public interest."⁴ To the contrary, there was no such policy decision made by the General Assembly for a coal facility constructed outside of Virginia. Moving to the cost estimate, the Commission explained that a fixed price contract (which was applicable to the DVP plant) was not the only way that APCo could support the reasonableness or prudence of the cost of the facility. Finally, the Commission, while emphasizing its respect for other commissions, made clear that the "actions of another state commission do[es] not override Virginia law nor nullify our duty to apply Virginia law."⁵

Although APCo noted its appeal to the Virginia Supreme Court while awaiting the Commission's decision on reconsideration, it later withdrew its notice. Despite the West Virginia PUC's previous grant of authority to APCo to construct the IGCC facility, in light of Virginia's decision, it entered an order on July 9, 2008, allowing the parties 30 days to file suggestions as to how it should proceed, other than rescinding its previous order. Two parties, APCo and the West Virginia State Building Trades Council, AFL-CIO, filed comments stating that a rescission of the order was not necessary and that the conditions imposed on the CPCN were sufficient to address any obstacles, including the Virginia denial. In its filing, APCo made note that it had received notification from the IRS that it would receive \$133.5 million in tax credits for the proposed facility.⁶ Two other parties, the Consumer

Advocate Division and the West Virginia Energy Users Group, filed comments recommending that the CPCN be rescinded. As of the date of this article, the West Virginia PUC has not entered an order on this issue. As recently as mid-August 2008, APCo has indicated that it would still like to move forward with the plant, and may approach the Virginia Commission requesting approval again.⁷ *

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³ See Va. Code § 67-102.D.

⁴ Va. Code § 56-585.1.A.6.

⁵ Order on Reconsideration at 13.

⁶ These tax credits were previously awarded to Tampa Electric Company for its second IGCC facility in Florida; however, TECO cancelled the plans to construct that facility in the October 2007 and thus the tax credits became available.

⁷ *Lynchburg New Advance*, "APCO to use more wind" (Aug. 14, 2008), available at http://www.newsadvance.com/lna/news/local/article/apco_to_use_more_wind/7429/

Dominion Resources Transaction *(continued)*

involved the sale of two natural gas public utilities, it was subject to approval by the Pennsylvania Public Utility Commission and the West Virginia Public Utility Commission. In addition, the parties were required to file a Hart-Scott-Rodino premerger notification form, which resulted in an antitrust investigation by the Federal Trade Commission (“FTC”).

On April 13, 2007, the transaction was approved by the Pennsylvania Public Utility Commission (“Pennsylvania PUC”). However, on the same day that the Pennsylvania PUC issued its decision, the FTC filed suit in United States District Court for the Western District of Pennsylvania to enjoin the proposed acquisition of Peoples by Equitable. In May 2007, the U.S. District Court granted the parties’ motion to dismiss, finding that the state action immunity doctrine precluded the FTC’s antitrust claims. The FTC appealed the district court’s dismissal to the Third Circuit and the closing of the transaction was enjoined by the Third Circuit pending the resolution of the appeal. The appellate briefing was completed in August, 2007 and the parties requested expedited treatment of the appeal. The Third Circuit heard oral argument on October 3, 2007 but the Third Circuit still had not issued an opinion as of January 2008. Because the deal had been pending for almost two years and the outcome of the litigation could continue to be delayed for a substantial period of time, Equitable decided that it could no longer tie-up almost \$1 billion in capital in this transaction and thus decided to terminate the transaction in January 2008.

Equitable Resources, Inc. provides, among other services, distribution of natural gas to approximately 257,000 customers in western Pennsylvania. The Peoples Natural Gas Company is a subsidiary of Dominion Resources, Inc. that also distributes natural gas to approximately 357,000 customers in western Pennsylvania. For historic and geographic reasons unique to western Pennsylvania (where the early discovery of local sources of gas facilitated the growth of heavy industry), a small number of geographically advantaged commercial and industrial customers are able to access gas from distribution facilities of more than one utility. As a result, a few commercial and industrial customers – fewer than 500 out of the companies’ more than 600,000 customers in west-

ern Pennsylvania – have been able to extract below cost-of-service discounts by playing Equitable and Peoples against one another. Because both utilities are subject to rate-of-return regulation, the vast majority of the two utility companies’ customers that do not receive discounts effectively subsidize the costs of providing service to those that do.

Pennsylvania Regulatory Approval Process

On March 1, 2006, Equitable and Dominion Resources entered into an agreement whereby Equitable would acquire 100% of the capital stock of Peoples and Hope Gas, Inc.¹ The parties were required by statute to obtain approval from the Pennsylvania PUC. Under Pennsylvania law, the PUC must find that an affirmative and substantial public benefit will result from the trans-

action before it can approve it. To make that determination, the PUC is required to consider the impact a proposed transaction would have on future utility rates and competition, as well as the synergies and efficiencies that would result. When the PUC considers the public interest, Pennsylvania law mandates that it evaluate the impact of the benefits and detriments of the acquisition on *all affected parties*, and not merely on one particular group or geographic subdivision.

On February 5, 2007, the Administrative Law Judge (“ALJ”) issued an 86-page Initial Decision in which he recommended that the transaction be approved. In determining that the transaction was in the public interest and therefore met the requirements for approval, the ALJ specifically concluded that the transaction would benefit all of the utilities’ customers in substantial ways. In particular, the ALJ found that the savings attributable to streamlining the overlapping pipeline facilities of Equitable and Peoples would “obviously reduce the financial burden on customers” and that “[t]he presence of these synergies is compelling.”

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¹ Hope Gas, Inc. is a West Virginia utility company and this part of the transaction was subject to approval by the West Virginia Public Utility Commission. However, the sale of Hope Gas to Equitable did not raise any potential antitrust concerns and was not investigated by the FTC because there was no competition between Hope Gas and Equitable in West Virginia. Since the investigation by the West Virginia Public Utility Commission did not address any potential antitrust concerns, it will not be discussed further in this paper.

Dominion Resources Transaction *(continued)*

The ALJ stated that the limited gas-on-gas distribution competition between Peoples and Equitable is contrary to the public policy of Pennsylvania because it leads to discounts that discriminate against most customers to the benefit of a select few: “[G]as-on-gas distribution competition is a ‘negative (or zero) sum game’ in which all customers, collectively, are harmed even though some few customers benefit. What one customer wins via rate discounts through gas-on-gas distribution competition, others lose via higher tariff rates.” The ALJ further concluded that “maintenance of gas-on-gas distribution competition is poor public policy” and that, accordingly, “[p]resent Commonwealth law and public policy do not favor competition among gas distribution utilities.” The ALJ added that “[s]olid economic theory supports the conclusion that the eventual disappearance of discounts arising from gas-on-gas distribution competition is in the public interest.”

On April 13, 2007, the PUC affirmed the ALJ’s decision and issued a CPC, finding that the transaction would be affirmatively in the public interest:

[W]e find the Joint Application as modified by the Settlement to be in the public interest.... Included in those affirmative public benefits are the Companies’ commitments to the rate case stay-out, exclusion of acquisition costs from rates, purchased gas cost savings, universal service and low income customer protections, service quality assurances, gas safety assurances, diversity assurances, improvement in operational practices which will positively impact the competitive retail gas market and increased use of native Pennsylvania gas.

The PUC further found that *ending* the gas-on-gas distribution competition would be an affirmative benefit of the transaction:

To continue to allow contract customers the ability to maintain their current rates would be to allow discriminatory treatment to continue.... Currently, due to gas-on-gas distribution competition, contract customers’ rates are below the cost to serve, and the deficit is paid for by the non-contract customers. *This is precisely what needs to be reversed.*

FTC Antitrust Investigation

The FTC conducted a premerger investigation concurrently with the Pennsylvania PUC proceeding. The parties argued that the state action doctrine precluded application of the federal antitrust laws to prohibit the proposed transaction

and that the transaction in any event was not anticompetitive because the efficiencies from the transaction overwhelmingly outweighed the potential lost discounts to less than 0.1 percent of Peoples’ and Equitable’s combined customer base.

The parties presented the same evidence to the FTC as they had to the Pennsylvania PUC to demonstrate that the transaction will produce substantial efficiencies and cost savings to the benefit of all customers, including agreeing to not file a base rate case through the end of 2009 (valued at approximately \$30-\$50 million); annual gas supply cost reductions of \$10 million; capital cost savings of \$7 million annually from elimination of redundant pipelines; and operating cost reductions of up to \$12.3 million per year.

The FTC, however, focused on the fact that the transaction would result in the elimination of discounts to less than 500 commercial and industrial customers (out of the 600,000 total customers) which currently can be served by both Peoples and Equitable. The parties presented evidence to show that the elimination of discounts to those customers would amount to less than \$10 million per year. Ultimately, on March 14, 2007, the FTC, by a 4-1 vote, authorized its staff to file an administrative complaint. On the day that the PUC approved the proposed transaction, April 13, 2007, the FTC filed its complaint and motion for a preliminary injunction in the United States District Court for the Western District of Pennsylvania, alleging that the proposed transaction would violate Section 7 of the Clayton Act and Section 5 of the FTC Act.²

District Court Decision Finding State Action Immunity

Before any hearing on the merits of the FTC’s request for a preliminary injunction, the district court granted the defendants’ Rule 12(b)(6) motion to dismiss the FTC’s case on May 14, 2007, holding that the state action immunity doctrine barred the FTC’s claims. Since the Supreme Court’s decision in *Parker v. Brown*, 317 U.S. 341 (1943), it has been a fundamental principle of antitrust law that “federal antitrust laws are subject to suppression by state regulatory programs.”

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² The FTC alleged that the relevant market in which to assess the competitive effects of the proposed transaction is “the local distribution of natural gas” to “the individual service location of *each nonresidential customer* that benefits, or could benefit in the future, from competition between Equitable and [Peoples]” and argued that, because, in its view, the transaction “will lead to significantly higher prices” in those narrowly-defined, individual customer “markets,” the transaction should be blocked regardless of the benefits to the customer base as a whole.

Dominion Resources Transaction *(continued)*

FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992). The state action immunity doctrine immunizes from antitrust scrutiny certain actions of private parties and state agencies or officials regulating the conduct of private parties in conformance with such state policies. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth a two-part test for determining whether state action immunity applies to an action taken by a private entity. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Id.* at 105.

The district court held that the application of the two-part *Midcal* test to the facts of this case was "rather straightforward." First, in holding that *Midcal's* clear articulation test that had been satisfied, the District Court stated:

Quite frankly, it is hard to imagine a more thorough 'articulation' of state policy of regulation meant to take the place of free market competition than the overall comprehensive regulatory scheme set forth in the Code by the General Assembly of Pennsylvania.

The district court also pointed out that the "permissible and appropriate scope and nature of competition among public utilities" is "within the jurisdiction of the PUC, and its 'exclusive direction.'"³

The court expressly rejected the FTC's argument that there was no clear articulation because the Pennsylvania Code directed the PUC to also evaluate the potential anticompetitive consequences of a transaction. Rather, the court held that "the fact that the Code and the PUC regulatory scheme direct that the PUC evaluate potential anticompetitive consequences does not undercut the fact that the General Assembly has replaced free market competition with regulation." As the court explained, the proposed elimination of gas-on-gas distribution competition was "*only one of the many* statutory factors considered by the PUC."

The court was likewise convinced that the "active supervision" prong of *Midcal* had been satisfied. In reaching this conclusion, it relied heavily on *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1265 (3d Cir. 1994), in which the Third Circuit had held that the general

rate oversight by the Pennsylvania PUC satisfied the active supervision requirement. The court noted that in the instant case, not only did "the PUC explicitly retain[] ongoing oversight authority and control over the merged public utilities," as in *Yeager*, but it also specifically conditioned its approval on Equitable's agreement to comply with heightened reporting obligations in the future and to limit its ability to seek future rate increases. Based on these facts and the precedent in *Yeager's Fuel*, the court held that "[i]t is obvious that the PUC is taking an active, hands-on approach to monitoring the transaction on an ongoing basis going forward, thus implementing the General Assembly's intended agency oversight over the completed transaction."

Having found that each of the prongs of the *Midcal* test had been satisfied, the court held that "the FTC must defer to the Pennsylvania General Assembly and the PUC which is implementing the Public Utility Code in this case, since the state action immunity doctrine insulates the PUC's approval of the merger ... from federal antitrust scrutiny."

FTC's Principal Arguments on Appeal

The FTC appealed the District Court's decision to the Third Circuit and, per the FTC's request, the Third Circuit stayed the closing of the transaction, pending appeal. On appeal, the FTC's principal argument was that the district court erred in finding the clear articulation prong was satisfied because it failed to identify any statutory basis to support its conclusion that Pennsylvania intended to displace competition in connection with the proposed acquisition. According to the FTC's argument, the mere fact that the Pennsylvania Utility Code mentions and requires approval of transactions does not evince an intent to displace competition with regulation. As set forth by the FTC, the fact that approval of the transaction by the PUC is based on a public interest finding does not demonstrate that the Pennsylvania legislature intended approval of anticompetitive acquisitions.

To the contrary, the FTC argued, the Natural Gas Choice

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³ Citing *City of Pittsburgh v. West Penn Power Co.*, 993 F. Supp. 332, 338 n. 13

Dominion Resources Transaction (continued)

and Competition Act (“NGCCA”), passed by the Pennsylvania legislature in 1999, specifically requires the PUC to reject anticompetitive acquisitions. This statute, the FTC claimed, shows that “Pennsylvania has acted to preserve, not displace competition when the PUC reviews acquisitions,” thus defeating the clear articulation prong of *Midcal*.

According to the FTC, the district court improperly based its analysis on statements by the PUC rather than the state of Pennsylvania. The PUC, the FTC asserted, is merely a subordinate state entity and does not speak for the Pennsylvania legislature. Statements by the PUC do not, therefore, constitute clear articulation of a Pennsylvania state policy to displace competition with regulation.

The FTC likewise argued that the active supervision prong of *Midcal* is not satisfied because the PUC will not actually supervise the anti-competitive impact of the acquisition going forward. Specifically, the FTC claimed that the anticompetitive harm will be the “elimination of customer discounts and incentives offered to builders and developers, and through a decline in the quality of customer service.” These are benefits that are either above and beyond the terms of the Pennsylvania regulations cited by the district court or simply outside the scope of the regulations entirely. Since these benefits are not overseen by the PUC, active supervision cannot be said to exist.

Equitable’s and Peoples’ Principal Arguments on Appeal

The parties countered the FTC’s argument that the PUC’s policy statements are irrelevant by pointing to the fact that the Pennsylvania legislature has specifically vested the PUC with the authority to determine what constitutes the public interest in considering particular transactions involving regulated utilities. Indeed, in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989), the Supreme Court described the Pennsylvania PUC as “an arm of the legislature” when it carries out its delegated functions. Likewise, in *Mobilfone of Northeastern Pennsylvania v. Commonwealth Telephone Company*, 571 F.2d 141 (3d Cir. 1978), the Third Circuit held that actions in conformance with the PUC’s decisions are immune from antitrust scrutiny under the state action immunity doctrine, even where those actions are alleged to have anticompetitive effects.

Peoples and Equitable argued that the FTC cannot cite any case in which a comprehensive state public utility regulation regime was found not to meet the active supervision prong of Midcal

Peoples and Equitable argued further that the central premise of the FTC’s argument – that the state must have legislation specifically “authorizing anticompetitive acquisitions by public utilities” – mischaracterized the *Midcal* standard. They asserted that the Supreme Court rejected precisely this argument in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), when it held that a state agency’s decision to allow collective rate setting by private parties created state action immunity although the private rate setting was not even mentioned in the statute.

Moreover, the parties argued, even if the PUC’s pronouncements were found not to constitute an articulation of state policy, the PUC’s approval of an anticompetitive transaction was a foreseeable result of the Pennsylvania statutory scheme and thus constitutes a clear articulation of state policy to displace competition with regulation.⁴ Since the Pennsylvania legislature authorized the PUC to review public utility mergers and determine whether they are in the public interest, considering a number of factors including competition, the parties argued that it was certainly foreseeable that approval of the transaction would result in the elimination of competition for some customers.

Finally, Peoples and Equitable argued that the FTC’s reliance on the NGCCA is misplaced because that statute was passed solely to ensure that natural gas distribution companies allow their customers the meaningful opportunity to purchase the commodity of natural gas from sources other than the gas distribution companies. The plain language of the statute, its legislative history, and the context in which it was passed all make clear that it pertains solely to supply choice for natural gas customers, not choice of natural gas distribution companies and does not affect the “clear articulation” analysis as to the merger of two natural gas distribution companies.

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⁴ See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985) (clear articulation prong of *Midcal* is satisfied where “the legislature contemplated the kind of action complained of.”).

Dominion Resources Transaction *(continued)*

With respect to the active supervision prong, Peoples and Equitable argued that the FTC cannot cite any case in which a comprehensive state public utility regulation regime was found *not* to meet the active supervision prong of *Midcal* as to activities that the state public utility commission had approved within its area of regulation. In any case, the lack of post-acquisition supervision of which the FTC complains is irrelevant to the active supervision analysis since the alleged anticompetitive act is the acquisition itself, which has been thoroughly evaluated by the PUC.

Termination of Transaction

The transaction agreement was signed by the parties on March 1, 2006. The Pennsylvania PUC completed its review and approved the transaction slightly over one year later in April 2007. The FTC's investigation also took approximately 13 months and then the FTC decided to file suit to enjoin the transaction in April 2007. After the FTC's Complaint was dismissed by the District Court on state action immunity grounds, the FTC decided to appeal the decision to the Third Circuit and obtained an injunction to prevent the closing pending appeal.

As of January 2008, which was almost two years after the agreement was signed, no decision had been issued by the

Third Circuit and the parties still were prevented from closing. Equitable determined that it could no longer tie up almost \$1 billion in capital and thus decided to terminate its effort to acquire Peoples in January 2008.

Equitable and Peoples subsequently submitted briefs to the Third Circuit requesting that the appeal not be dismissed as moot because the same issue is likely to be raised again in another utility transaction. However, without issuing an opinion or any explanation, the Third Circuit dismissed the appeal as moot and also vacated the District Court's decision. ✱

Natural Gas Conservation and Ratemaking Efficiency Act *(continued)*



¹ A sales adjustment clause will adjust actual nongas distribution revenues per customer to an allowed level of distribution revenues per customer.

² A straight fixed variable rate design will align the percentage of fixed charge revenue recovery with the percentage of the utility's fixed costs. The Act requires that a straight fixed variable rate design include a substantial demand component based on a customer's peak usage.

³ Cost effectiveness is determined based on an analysis using the Total Resource Cost Test, the Societal Test, the Program Administrator Test, the Participant Test, the Rate Impact Measure Test and any other test the Commission reasonably deems appropriate. The Commission may determine the weight to be given to a test.

⁴ "Independently verified net economic benefits" refers to the sum of customer savings less utility costs, measured over the number of years of the payback period, with the payback period rounded up to the next highest year.

⁵ "Revenue-neutral" means a change in a rate, tariff design or mechanism as a component of a CARE Plan that does not shift annualized allowed distribution revenue between customer classes, and does not increase or decrease the utility's average, weather-normalized nongas utility revenue per customer for any given rate class by more than 0.25 percent when compared to (i) the rate, tariff design or mechanism in effect at the time a CARE Plan is filed or (ii) the allocation of costs approved by the Commission in a rate case using the cost of service methodology set forth in § 56-235.2 or a performance-based regulation plan authorized by § 56-235.6, where a CARE Plan is filed in conjunction with such case.

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."

Trans-Allegheny Interstate Line *(continued)*

Warren, Rappahannock, Culpeper, Fauquier, Prince William, and Loudoun Counties. The Virginia part of the line would cost between \$131 and \$243 million. PJM², a regional transmission organization, determined the need for the transmission line, based on NERC transmission planning reliability standards. This area was also designated in October, 2007 by the Department of Energy (DOE) as a National Interest Electric Transmission Corridor (NIETC).

I. Legal Issue of Considering Interstate Need

As with many transmission line cases, the issues centered on the need for the project and on the specific routing of the line. The issue of need in this case deviated from more traditional cases as it also involved, at least tangentially, the need for the line in not only Virginia but also in the larger regional area and whether those needs were compatible or at odds. In order to facilitate construction of major new transmission facilities in congested areas, the federal Energy Policy Act of 2005 empowers the Federal Energy Regulatory Commission with supplemental “back stop” siting authority under certain conditions for projects within a NIETC. One such condition occurs if the state does not have the authority to consider the interstate benefits of the line. The SCC, in its initial order, requested legal memoranda on the issue of whether “[u]nder Virginia law, is the Commission permitted, or required, to consider regional, multi-state need in reviewing an application for a line in Virginia?”³ On this issue, the SCC ultimately concluded that:

We may properly consider regional, multi-state need and benefits as part of our evaluation under Virginia statutes; the weight accorded evidence of regional, multi-state need and benefits logically would increase to the extent that such need and benefits are related to, or affect, need and benefits within Virginia.⁴

II. Factual issue of the need for the line in Virginia and regionally.

The Hearing Examiner began his analysis of need before turning to the routing question. He focused his analysis of the need for the line under Va. Code § 56-46.1 B based on load flow modeling, contingency analysis and reliability needs presented to justify the line.⁵ He begun by reviewing the North American Electric Reliability Corporation’s (NERC) reliability standards which became mandatory pursuant to EAct 2005. PJM prepares a Regional Transmission Expansion Planning

Protocol each year and identified the need for the proposed line in 2006. The hearing examiner concluded that the tests employed by Dominion and PJM appropriately applied the NERC transmission reliability standards, consistent with the findings of the Commission Staff consultant.⁶

On load forecasts, a number of parties challenged the lack of inclusion of sufficient demand side management (DSM) to offset future demand. The Hearing Examiner found that a lack of certainty made it difficult to incorporate further DSM into the load forecasts.⁷ On future generation, which could reduce or eliminate the need for the line, the hearing examiner found that the applicants’ assumptions regarding future generation were consistent with the federally-mandated separation of transmission and generation, and PJM’s general lack of authority to mandate construction of new generation, but found them less reliable the further out in time the planning horizon.⁸ On the question of whether to include generation that failed to clear the recent RPM (reliability pricing model) auctions, the hearing examiner concluded that test results that included generation that failed to clear the auction should be given the greatest weight.⁹ The hearing examiner also determined that because questions remain about RPM, particularly the mismatch of load growth and transmission planning on a five- and fifteen-year basis, emphasis should be 2011 and 2012 projections.¹⁰ Based on the projected load-flow results for 2011 and 2012, the hearing examiner found the need for the line to address violation of NERC standards was supported.¹¹

On the factual question of whether the line was need by Virginia and/or the region, the hearing examiner found suffi-

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¹ *Joint Application of Virginia Electric and Power Company d/b/a Dominion Virginia Power and Trans-Allegheny Interstate Line Company, for certificates of public convenience and necessity to construct facilities: 500 kV Transmission Line from Transmission Line # 580 to Loudoun Substation*, Case No. PUE-2007-00031, Report of Alexander F. Skirpan, Jr., Hearing Examiner (July 28, 2008).

² PJM Interconnection, LLC

³ Case No. PUE-2007-00031, Order for Notice and Hearing, Ordering ¶ 21 (June 1, 2007).

⁴ Case No. PUE-2007-00031, Order, p. 3 (Jan. 29, 2008).

⁵ Report, p. 167.

⁶ Report, p. 171.

⁷ Report, p. 176.

⁸ Report, p. 178.

⁹ Report, p. 180.

¹⁰ Report, p. 182.

Trans-Allegheny Interstate Line *(continued)*

cient Virginia-specific and regional need:

While there is little disagreement that the proposed transmission line is designed to address regional needs, the fact remains that the proposed line ends in Northern Virginia and need for this line is based generally on overloads modeled to occur on the Mt. Storm-Doubs line, most of which is owned by Dominion and originally built to serve Northern Virginia. Regardless of the cause of the overloads on Mt. Storm-Doubs, the effects of the overloads on this line will be borne by residents and businesses in Northern Virginia based on their proximity to the line. Therefore, I find that consistent with the Commission's *January 29 Order*, sufficient Virginia need has been shown to give full weight to the line's regional need.¹²

Some parties further challenged the need for the project based on the environmental burden to Virginia. The hearing examiner rejected this assertion: "Put simply, in the analysis of need undertaken herein, environmental impacts do not trump system reliability."¹³ And, because the line would not address the problems with system reliability unless the entire line is built, not just the Virginia portion, the hearing examiner recommended any approval be conditioned on approval of the West Virginia and Pennsylvania sections of the line.¹⁴

III. Routing

At the outset of his routing discussion, the Hearing Examiner rejected any undergrounding of the proposed line, largely because it would be Dominion and PJM's first high voltage direct current transmission line and would be the world's first high voltage direct current transmission line with capacities approaching 3,000 MW. It would also be cost-prohibitive, estimated at \$1.0 billion as opposed to \$131-\$243 million estimate to construct the line above ground.

Of the two main routing options, the Southern Route and I-66 Alternative, the Hearing Examiner recommended the Southern Route. While considerably more expensive, longer, and impacting more homes, the Southern Route made a better use of existing rights-of-way and corridor. "In this case, use of the existing right-of-way and corridor by the proposed Southern Route is further strengthened by that route's less impact on historic and cultural assets, and by uncertainty raised by VDOT regarding the alternate I-66 Route." While

the greater number of houses would be affected, he noted that a number of the homes along the Southern Route already face, and were built next to, an existing transmission line. The major problem with the I-66 route, the uncertainty raised by VDOT, had to do with sharing VDOT's right of way, particularly that there were only a few areas where Dominion could parallel VDOT's limited access right-of-way and these areas were not sufficiently continuous for a reasonable routing and collocation of the line within I-66 right of way would have a negative impact on the ability of VDOT to maintain the highway and create a safety and access issue for Dominion.

IV. Conclusion

On the heels of the Hearing Examiner's recommendation, on August 2, the West Virginia Public Service Commission approved the West Virginia portion of the line. On August 21, however, administrative law judges recommended the Pennsylvania Public Utility Commission deny the line. As in Virginia, the recommendations may be accepted or rejected by the PUC. Just as this article was going to print, Allegheny Energy announced that it had agreed to re-route large portions of the line through Pennsylvania.

The Virginia portion of the line still must be approved by the SCC who may adopt or reject the Hearing Examiner's recommendations or remand the case for further consideration. Under EPC Act 2005, FERC may have siting authority over the line, or portions of the line, if a state fails to act on an application within one year from time the area was designated a NIETC or if an applicant does not receive approval from a state to site a proposed new transmission facility within a NIETC. The entire length of the proposed line was designated by the Department of Energy as such on October 2, 2007, and the Hearing Examiner ruled that it was his understanding that the one year period for state review of transmission projects in a designated NIETC corridor began on October 2, 2007. The designation itself of the mid-Atlantic corridor as a NIETC is also the subject of a pending appeal to the Ninth Circuit Court of Appeals. *

About the Author: See About the Editor.



¹² Report, p. 197.

¹³ Report, p. 198.

¹⁴ Report, p. 199.

Demand Response: Now More than Ever? *(continued)*

the ongoing collaborative between FERC and the National Association of Regulatory Commissioners (NARUC) and suggests FERC's new "Energy Innovations Sector" should work with NARUC and "state entities" to foster demand response at both the Federal and state levels.

Mirroring FERC's proactive stance, RTOs, ISOs, regional associations, state commissions and individual utilities have likewise ramped up processes to examine, test, and (in some cases) implement mechanisms to catalyze demand response, both for reliability and price elasticity purposes.¹⁰ Moreover, a brand new industry composed of "demand response providers" has cropped up to advocate for incentives in a plethora of regulatory forums and initiatives. These businesses act both to assist utilities in designing and launching successful programs and in representing end users in aggregating demand and interfacing with utility system operators.

The best news on the smart metering front is that the per-customer cost for retrofitting existing loads and attaching new ones with meters suitable for demand response communications is coming down, as interest in the product grows — although it is still a considerable upfront expenditure.

Essential preconditions. Discussions of demand response's potential to become a significant reliability "resource" or trigger greater buyer price elasticity often revolve around the structural prerequisites for making this happen. These generally include: (1) *dynamic pricing* (a tariff that forces customers to confront the real or "marginal" cost¹¹ of electric energy); (2) *Advanced Metering Infrastructure (AMI)* (which gives consumers not only immediate access to current prices but also records their load responses);¹² (3) *comparability* (treating generation and demand response "resources" alike); and (4) *consumer awareness* (publicizing not only the tangible benefits of demand reduction but also the public interest and "green" dimensions). Utilities might add that a fourth essential precondition is *cost recovery* for incentives, infrastructure and customer education investments, as well as making them whole for any lost energy sales.

"Dynamic pricing" can be designed to reflect not only immediately avoidable incremental energy costs during peaks, but also to signal (and pass through) some of the long-term savings attributable to reducing the need for new infrastructure. AMI may include more ambitious load-control features that *automate* reduced consumption of electricity during peak-load periods (rather than merely giving customers an *opportunity* to make *ad hoc* load reductions). Automated load management infrastructure would allow

thousands of homes and small business to mimic the highest-value form of demand response practiced by industrial loads — "dispatchable" demand response (allowing system operators to control load reductions at individual customer sites). The more "hard-wired" the load reduction is, the greater the rewards; if operators can rely on loads to curtail when most needed for peak management, customers can rightly lay claim to payment for contributing firm "capacity," in addition to helping avoid energy costs.

This leads back to the "comparability" principle championed, most notably, by FERC in framing Orders 890 and 890-A and in reviewing the latest market designs for energy and ancillary services proposed by RTOs and ISOs. The idea of "comparability" embraces the notion that a megawatt a system operator does not, thanks to demand response, have to generate or purchase is worth every bit as much as a megawatt produced by a physical generator. Accordingly, in RTO/ISO contexts, a demand "resource" should be able to bid into competitive hourly energy spot markets its willingness to take a curtailment, expressed in monetary terms. If this offer clears the market, the load is compensated precisely as though it were a positive megawatt.¹³

Customization to elicit fuller participation. As demand response rate designs evolve, a tension arises between calls for national uniformity versus the "let a thousand flowers bloom" approach. For example, a mass merchandising chain with

— *continued on next page*



¹⁰ On November 16, 2007, the Virginia SCC Staff completed a comprehensive analysis of such opportunities in the state, based on extensive stakeholder input. The report, undertaken in response to a General Assembly enactment (SB 1416, 2007), concluded that the goal of 10% reduction in energy consumption by 2022 is feasible through a mix of conservation, energy efficiency, demand side management, and demand response programs -- and is, indeed, "absolutely imperative." The SCC, in turn, submitted the report to the Governor and General Assembly.

¹¹ In a state served by an organized competitive spot market, the hourly price is a single, market-clearing price, providing a convenient "marginal cost." In a regulated, cost-based system, a weighted average hourly cost, reflecting *all* operating units, could be calculated, and that would convey somewhat higher price signals to conserve in high-use hours. An economist might argue, even in a cost-based system, that "dynamic pricing" should be based not on averages but on the marginal cost of the most costly unit needed.

¹² Most meters in place record cumulative use over time without indicating use in particular hours. Some experts have questioned whether a headlong rush into installing AMI at customer sites is a prerequisite to implementing some kind of time-of-use rate design and obtaining some degree of demand response.

¹³ A standing commitment to accept a curtailment — *i.e.*, a "reliability" demand response offer — is more valuable to the system than an *ad hoc* offer by an end user to interrupt to reduce current energy costs (known as "economic" demand response). Notably, RTOs such as ISO-New England and PJM have recently redesigned their "forward capacity markets" to ensure long-term system reliability, and have accepted demand response commitments as "capacity" bids, honoring FERC's comparability principle.

Demand Response: Now More than Ever? *(continued)*

retail outlets in all fifty states might prefer to see substantially similar incentives, rules, and protocols everywhere for ease of strategic planning and administration. On the other hand, “home-grown” state collaboratives are likely to come up with varying solutions to common issues. Program design also needs to be mindful of the fact that loads, whether residential, commercial, or industrial, tend to have many different levels of tolerance for curtailments. Homeowners will attach differing priorities to the comfort and convenience of a constant power flow, have different appetites for sacrifice in the public interest, and have different economic sensitivities. Businesses have an additional pressure point: meeting customer needs comes ahead of dancing to the tune of the power system. Moreover, industrial processes have widely differing abilities to absorb and/or recover from power curtailments (and may or may not have backup power).

The upshot is that a truly effective demand response program – one that will tap into a maximum number of customers – may need a lot of wrinkles. Moreover, a modest exposure to interruption at first may give a customer more confidence to increase exposure (and incentive revenues) as times goes on, yielding greater system benefits.

The tradeoff between uniformity and customization carries over into FERC’s review of RTO and ISO mechanisms and protocols. FERC has tended to show tolerance for regional preferences across a wide spectrum of tariff issues, and likely will be compelled to strike similar balances in this context.

Tough issues on the horizon. In spite of the immense interest and flood of capital – monetary and intellectual – now being directed at demand response, there are plenty of challenges ahead in turning good intentions into good policy and rate design. Just a sampling would include:

Getting smarter about smart meters. With the convergence of advances in communications technology and enthusiasm to reinvigorate demand response, there is a growing wealth of choices on metering and “smart” appliances to facilitate load reduction. The question for state commissions and the utilities they supervise becomes whether to make a choice quickly and plunge in with massive installations; to dip a toe in (through pilot projects that test consumer response along with “dynamic pricing” rate designs); or to stand back and let other states or regions take the lead (and absorb any lessons). California, one of the states in the vanguard, has already experienced a popular backlash to “mandatory” thermostat software in new construction (controlled through radio signals), per-

ceived as “big brother” metering. This hints at the significant tradeoffs in selecting policy: a stronger utility hand on the dial leads to larger and more certain reliability and energy benefits; but if the public rejects the technology, it does little good. Obviously, *smart marketing* is an indispensable ally.

Curbing the free riders. For industrial and large commercial loads, the challenge is to design incentive program that *don’t pay* for load reductions that would have occurred in any event. Fears of “gaming strategies” exploiting the way PJM and ISO-New England set the “baseline” from which load reductions are measured have led critics to accuse demand response providers of pocketing millions in gratuitous payments. These two RTOs have now tinkered with their formulas for calculating the “baseline” and, with FERC’s approval, hope they’ve reduced the problem.

Dividing the benefits pie. Participation in time-of-use rate programs has, in the past, largely been promoted as a way of lowering electricity bills by shifting consumption to times when power is less costly to produce. But how much, if any, of the *system benefits* from lower demand (*i.e.*, both short and long-term avoided costs) should volunteer participants also receive in compensation?

While a “robust” demand response has been elevated to near-holy grail status in energy market design, it is nothing if not tricky to bring off. FERC, which is rarely bashful about staking out a leadership role (and contouring its jurisdiction to fit its vision), is prominently waving its baton – while also entreating state commissions to join in cooperative endeavors, rather than waging a tug-of-war over who’s in charge. Hopefully, the utility industry will avoid a diversion into this battleground, as the goal of tapping into the demand response resource is too urgent. *

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The Future of Nuclear Waste (continued)

“burned” again by reorganizing the balance of critical elements. Mature technology allows for about 30% energy recovery from spent nuclear fuel. Reprocessing is a common practice in France, Japan, and Russia. Researchers in those countries hope that “Generation IV” reactors will help increase the efficiency of waste reprocessing, and reduce final waste up to 95%. Such reactors are not expected to be viable until 2030.

Reprocessing has the potential to reduce the amount of decay heat generated by waste as well as total waste volume. The ability to disperse decay heat is a key limiting factor to the capacity of a deep geological repository. Reprocessing existing spent fuel has the potential to increase the functional capacity of Yucca Mountain by reducing the amount of decay heat produced by waste, while simultaneously reducing the total volume of waste as well.⁷

Spent fuel reprocessing is not without its drawbacks. Reprocessing raises the cost of nuclear fuel significantly because refining freshly mined uranium is easier and less problematic than reprocessing already highly radioactive waste. Due to the low cost of nuclear fuel in the first place, the overall increase in the cost of nuclear electric power has been estimated between ten percent⁸ and two percent of current retail electric rates.⁹ As Uranium prices increase, the relative cost of reprocessing goes down.

Reprocessing also creates a significant amount of low-level radioactive waste. While the danger posed by low-level waste is less immediate than that of spent nuclear fuel, it is still a valid concern both for the environment and public health.

Depending on the type of reprocessing used, there is also a potential nuclear proliferation risk. Reprocessing spent fuel isolates plutonium that could be used in a nuclear weapon. For that reason, civilian reprocessing was banned in 1977. Although the ban was later lifted, the U.S. has discouraged reprocessing in favor of the once-through fuel cycle until recently.

In 2006, the U.S. announced the creation of the Global Nuclear Energy Partnership, an international project to reprocess spent nuclear fuel in a manner that renders the plutonium in it unusable for nuclear weapons. Several parties have expressed concern over the remaining potential for weapons grade plutonium being produced under the Partnership. In 2008 Congress approved less than half the requested funding for the Partnership, and its future remains uncertain.

Despite its various drawbacks, reprocessing could help avoid the need to select a second deep geological repository. Considering the excruciating experience of licensing Yucca Mountain, it is a valid question whether the nation is willing to expend the time, money, and political energy necessary to push through a second location for permanent nuclear waste storage. Reprocessing holds the potential to stretch the usefulness of Yucca substantially into the future, and would delay, if not avoid, a second regulatory fiasco.

Whether the U.S. chooses to begin reprocessing fuel or not, the decision will have a significant effect on planning future nuclear plants. Without reprocessing, projected volumes of waste will probably necessitate that dry-cask storage continue even if Yucca Mountain is opened in 2017. Provisions for such storage will have to be factored into the projected costs of new facilities. On the other hand, if reprocessing is used, the cost of fuel will increase and potentially require new reactor technology, which could also increase prices and electric rates.

Currently, the Federal Government is obliged to compensate utilities for storing nuclear waste on-site.¹⁰ It is unclear whether any new nuclear power plants will qualify for such compensation.¹¹ If Yucca is not licensed by the NRC, it seems likely Congress will change the terms of the Nuclear Waste Policy Act. While existing plants will probably continue to collect storage fees even if the Act is modified, new plants may enter service under different terms. Reprocessing

— continued on next page



⁷ See *Will the United States Need a Second Geologic Repository?*, <http://www.nae.edu/nae/bridgecom.nsf/weblinks/MKEZ-5S3Q6M?OpenDocument> (last visited July 22, 2008).

⁸ *Statement of Dr. Phillip J. Finck*, http://www.anl.gov/Media_Center/News/2005/testimony050616.html (last visited July 22, 2008).

⁹ See *The Economics of Reprocessing vs. Direct Disposal of Spent Nuclear Fuel*, <http://belfercenter.ksg.harvard.edu/files/repro-report.pdf> at 22 (last visited July 28, 2008). Estimated a .13 cent per KWh increase cost of energy due to reprocessing. The cost of uranium has risen considerably since this study, which suggests an even lower increase in energy costs due to reprocessing today.

¹⁰ Under the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 et seq., nuclear power plants are required to enter contracts with the DOE for the DOE to take title to spent nuclear fuel. Because Yucca Mountain is not operational, the DOE cannot take title to the waste, and has been required to pay damages for breach of contract.

¹¹ It seems unlikely that any future contracts will place the risk of paying for temporary storage on the DOE. Because no new nuclear plants have come online since Yucca was originally scheduled to open, there has not yet been a test case for how the Nuclear Waste Policy Act will be implemented in light of Yucca's long delay.

The Future of Nuclear Waste *(continued)*

waste would also probably require alterations in the Act, as the current law assumes a once-through fuel cycle.

Both current presidential candidates have articulated strong views on the future of nuclear power, suggesting the outcome of November's election will significantly influence the future of the industry.

Senator Obama has indicated strong opposition to the Yucca Mountain deep geological repository. Obama does not offer a specific plan for long-term storage, but he does state that he will attempt to increase the safety of current dry cask facilities, suggesting a shift toward intermediate term storage on-site. Senator Obama appears to oppose further nuclear development until waste storage is resolved.

Senator McCain relies heavily on new nuclear development in his energy policy, proposing 45 new nuclear reactors by the year 2030. The number of new plants McCain proposes strongly suggests some form of reprocessing will be necessary in order to mitigate increased spent fuel production. Senator McCain has historically been a strong supporter of the Yucca Mountain project.

Whatever course the nation takes regarding spent nuclear fuel, the ramifications will not end with the real-estate surrounding Yucca Mountain and the Nevada dessert. Current production of spent nuclear fuel in Virginia can be estimated at about seventy metric tons annually.¹²

Nationally production is about 2,300 metric tons annually.¹³ Unless either the statutory cap on Yucca's capacity is increased above 70,000 metric tons, or reprocessing is undertaken in the near future, long term storage options will be an ongoing concern in the states such as Virginia, where waste is produced. States without dry-cask storage will need to build such facilities, and states such as Virginia will need to expand the size of existing dry-cask operations. ✱

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¹² The current MW output of all plants in Virginia divided by the sum of the age in years of each storage site multiplied by the MW output of that site and divided by the total current MT of spent fuel stored on those sites. $(799 + 799 + 924 + 910) / (((799 * 35) + (799 * 34) + (924 * 29) + (910 * 28)) / 2,200) = 70.296$.

¹³ See *How Much Waste is There in the United States*, http://www.ocrwm.doe.gov/ym_repository/about_project/waste_explained/how-much.shtml#skiptop (last visited August 6, 2008)

**CASE ALERT:
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TO REVIEW AND REVISE THE RULES OF
PRACTICE AND PROCEDURE – CASE
NO. CLK-2008-00002 – COMMENTS
DUE OCTOBER 3, 2008**

Coal-Fired Plant *(continued)*

compared to alternative new coal-fired generation at another location. Such a finding, the Commission stated, would result in the public interest finding being “effectively nullified.”⁵

The Commission cautioned, however, that Dominion Virginia Power did not have a “blank check”: “we do not find that it is reasonable and prudent for the Company to incur any amount of costs above the cost estimates that comprise the projected level of \$1.8 billion.”⁶ Dominion Virginia was ordered to return in a future proceeding for additional approvals in the event that costs exceeded \$1.8 billion.⁷

II. Return on Equity

A. General Return

Under the statute, the Commission was required to set a return on equity associated with the plant as it would in a biennial review proceeding, through use of traditional methodologies, but subject to a cap and floor based on the application of a new methodology involving comparison of return of a statutorily-defined peer group. The statute provides parameters for identifying peer group utilities and once that group is determined, the companies with the two highest and lowest returns are eliminated. From that group, the Commission must select “a majority to use to calculate the cap and floor.” Once this was done in Dominion’s case,⁸ eleven potential peer companies remained. The Commission adopted the recommended eight-member peer group contained in the Stipulation proposed by the stipulating parties, resulting in an ROE for the plant of 11.12%. The Commission stressed that “[w]e emphasize that our finding herein in no manner limits the methodology or rationale that may be applied in other proceedings – involving the Company or other electric utilities”⁹

B. Enhanced Return

In its initial application, Dominion Virginia Power requested a 200 basis point (2%) adder under the statute allowed for plants which are “carbon capture compatible, clean-coal powered.” None of the parties took significant issue with the plant being “clean-coal” powered as defined by the industry. However, “carbon capture compatible” was subject to a lot of testimony that no technology currently exists which can capture carbon, making it difficult to define and meet the standard of “carbon capture compatible.” Dominion Virginia Power had asserted that it had taken steps to make its plant compatible with future carbon capture technology, but ultimately, in the Stipulation, the Company agreed to a 100 basis point adder applicable to conventional coal plants under

the statute. The Commission adopted the stipulated adder, and, as a result, the Commission expressly made no finding on whether the coal plant met the statutory requirement to be carbon capture compatible.¹⁰ The Commission opined that “clean-coal” and “conventional coal” were not mutually exclusive under the statute,¹¹ thus eliminating the possibility that the plant might not qualify for either the 200 basis point “clean-coal, carbon capture compatible” or the 100 basis point “conventional coal” adder, as argued by some parties.

The statute further provides that the enhanced return would apply between 10 and 20 years, depending on critical value of the project and the development risk. As provided for in the Stipulation, the Commission applied the enhanced return for 12 years.¹² The Commission further noted that the Company was not prevented from returning and applying for the 200 basis point adder applicable to “clean-coal, carbon capture compatible” plant, but that the adder would only apply to the remainder of the 12 year period if approved.¹³

III. Constitutionality under the Commerce Clause

The SELC challenged the constitutionality of the statute under the Commerce Clause on the grounds that it required use of Virginia coal, to the detriment of out-of-state and foreign coal markets under a line of cases beginning with *City of Philadelphia v. New Jersey*, involving unconstitutional interstate discrimination. The Commission rejected the argument, reasoning that the statute did not require use of only Virginia coal.¹⁴

The SELC has noted its appeal to the Supreme Court of Virginia on the issue of the constitutionality of the statute under the Commerce Clause. The formal ground breaking ceremony on the site occurred on August 14, 2008 and it is expected to take four years to construct the plant. *
 About the Author: See About the Editor (p.1).



⁵ Final Order, p. 13.

⁶ Final Order, p. 14.

⁷ Final Order, p. 15.

⁸ A different peer group will typically be applicable to each utility because corporate sister companies are eliminated.

⁹ Final Order, p. 19.

¹⁰ Final Order, p. 20.

¹¹ *Id.*

¹² Final Order, p. 21.

¹³ Final Order, p. 22.

¹⁴ Final Order, p. 6-7.

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