THE ADMINISTRATIVE LAW SECTION OF THE VIRGINIA STATE BAR WWW.VSB.ORG/SECTIONS/AD/INDEX.HTM

Administrative Law News

VOLUME XV, ISSUE 5 MARCH 2009

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"It Isn't Easy Being Green"

By Cliona Mary Robb

As this article was going to press, the General Assembly was considering legislation based on Governor Kaine's Renew Virginia program, and President Obama had just signed a federal stimulus package with national incentives for "green" initiatives. Encouraging clean energy, environmentally friendly construction, energy independence, and energy efficiency and conservation are increasingly described under the broad label of "sustainability." As the enthusiasm increases for sustainability initiatives, the inclination to broaden the objectives of electricity regulation keeps growing.

The increasing overlap between electricity regulation and sustainability policy has major implications for Virginia. Traditionally, energy regulation policy in Virginia has been focused on insuring just and reasonable rates. More recently, the policy objectives of energy regulation are widening to encompass sustainability objectives, such as encouraging the production of renewable energy. Traditional objectives and sustainability objectives can be at odds with each other, and how these internal tensions get resolved is especially significant in today's economic environment.

House Bill 2404, titled "Virginia Universities Clean Energy Development and Economic Stimulus Foundation" in this year's General Assembly session, illustrates how traditional objectives and sustainability objectives can be expressed simultaneously in the same legislation. While this bill concerns funding issues rather than setting regulatory policy, it nonetheless addresses the same kinds of competing interests that are increasingly impacting regulatory policy. H.B. 2404 states that each funding request submitted to

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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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Administrative Law News

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Message from the Chair . . . Kiva Bland Pierce

Hello and welcome to the second newsletter of this bar year. Now that all of the section applications have been processed, I am happy to report that our section membership continues to grow and we reached a record number, 459!

The General Assembly passed several resolutions electing judges. These include the election of LeRoy R. Millette, Jr. as a justice of the Supreme Court for a term of twelve years commencing February 1, 2009, Rossie D. Alston, Jr., as a judge of the Court of Appeals for a term of eight years beginning March 1, 2009, Cleo E. Powell as a judge of the Court of a Appeals for a term of eight years commencing February 1, 2009, and James C. Dimitri as a State Corporation Commissioner for a term beginning February 1, 2009, and ending January 31, 2014. Congratulations!

The Board of Governors continues to plan a variety of activities for the Administrative Law Section. In an effort to better understand the membership of the section, we circulated a survey in December. Though the responses were not numerous, they were enlightening. We will use this information to assist us in creating a five year plan for the section. If you have suggestions on how the section can better serve you, whether by expanding current activities or creating new ones, please let me know. After all, this is *your* section, and we can only make it better by hearing from *you*. I look forward to hearing from you and may be reached at 804-786-3809 or kpierce@oag.state.va.us.

Jim Copenhaver accepted the task of updating the section's website. He is in the process of ensuring that all of the past newsletters are available online. Additionally, he will be organizing and updating the information on past National Regulatory Conferences.

Brian Greene is planning a brown bag luncheon for this spring. Stay tuned for more information!

Please see the articles in the newsletter containing information on the upcoming National Regulatory Conference, May 19-20, and the joint CLE program at the annual VSB meeting in June 2009. These are two exciting programs and I encourage you to attend.

Ashley Macko continues to work tirelessly in preparing and editing our section newsletters. This is her third year as Newsletter Editor and she has done an excellent job publishing two newsletters each year!

Since this is probably my last official "Message from the Chair," I want to take this opportunity to extend a warm thank you to Board of Governors. Your input and assistance has been invaluable this year. Additionally, I'd like to thank Catherine Huband, our Virginia State Bar liaison, for her assistance and patience.

I hope to see you at the section activities scheduled for the remainder of 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 and later worked in private practice. Her undergraduate degree comes from Louisiana State University.

Commission Authorizes VNG to Implement First Conservation and Ratemaking Efficiency Plan

By James S. Copenhaver

The Virginia State Corporation Commission ("Commission") issued an Order on December 23, 2008[1] authorizing Virginia Natural Gas, Inc. ("VNG") to implement the first Conservation and Ratemaking Efficiency Plan ("CARE Plan") in Virginia under the Natural Gas Conservation and Ratemaking Efficiency Act[2] ("Act"), §§56-600 *et seq*. of the Code of Virginia. VNG's CARE Plan was approved for a three year period commencing on January 1, 2009.

The Act requires a CARE Plan to include (i) a decoupling mechanism[3], (ii) one or more cost-effective conservation and energy efficiency programs, (iii) a normalization component that removes the effects of weather from the determination of conservation and energy efficiency results, (iv) provisions to address the needs of low-income or low-usage residential customers, and (v) provisions to ensure that rates and services to non-participating classes of customers are not adversely impacted. The Commission is required to approve a CARE Plan if the decoupling mechanism is revenue neutral and the Plan is otherwise consistent with the Act.

VNG's CARE Plan includes a Revenue Normalization Adjustment ("RNA"), which is a decoupling mechanism that provides for a sales adjustment to customer's monthly bills. The RNA is designed to separate revenues from throughput, thus enabling VNG to mitigate the revenue impact of declining customer usage and to promote energy efficiency and conservation while recovering its fixed costs. In response to Staff opposition to the RNA, the Commission found that the Act specifically contemplates decoupling by means of a "sales adjustment clause."[4]

VNG also proposed an Energy Conservation Plan ("ECP")[5] comprised of incentives for seasonal check-ups, low income home weatherization, programmable thermostats, energy efficient tankless water heaters, energy efficient tank water heaters, energy efficient space heating equipment, ENERGY STAR® rated new construction installations and annual discount coupons for air filter replacements. The proposed ECP included a community outreach and customer education program.

The Commission found that the ECP passed all of the cost effectiveness tests identified in the Act[6] except for the Rate Impact Measure ("RIM") test, which measures the rate impact of conservation and energy efficiency programs on residential customers that do not participate in such programs. The Commission acknowledged that the Act does not require a program to pass any or all of the tests and affords the Commission discretion to determine the weight to be afforded to each test. However, the Commission highlighted the fact that a significant percentage of non-participants could be adversely impacted by the ECP and noted that it is appropriate to consider the number of customers targeted, and the type of programs that they are targeted with, as part of its analysis.

The Commission determined "(1) that for the Plan to be cost effective under the Act, the annual funds proposed by the Company should be allocated in a manner that appreciably increases the realistically possible number of participants in significant conservation measures; and (2) that this shall be accomplished by increasing the allocation of funds for the Programmable Thermostat Program…."[7] The Commission explained that the reallocation of funds was necessary to reduce the number of non-participants that will be required

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[1] *Application of Virginia Natural Gas, Inc. For approval to implement a natural gas conservation and ratemaking efficiency plan including a decoupling mechanism and to record accounting entries associated with such mechanism*, Case No. PUE-2008-00060, Order Approving Natural Gas Conservation and Ratemaking Efficiency Plan (Dec. 23, 2008) (hereinafter "Order").

[2] The 2008 Session of the Virginia General Assembly enacted the Act, which is intended to more closely align the interests of natural gas utilities, their customers, and 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 Commission approval of CARE Plans.

[3] 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. A decoupling mechanism thus removes the incentive under traditional rate designs for natural gas utilities to promote increased consumption in order to increase profits and correspondingly removes 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 clause, a straight fixed variable rate design, or a similar mechanism that substantially decreases the relative amount of nongas distribution revenue affected by changes in per customer consumption of gas.

[4] Order at 15.

[5] VNG's initial CARE Plan proposal was modified in a Revised Stipulation filed on October 29, 2008.

[6] The cost-effectiveness of conservation and energy efficiency programs are to be determined utilizing 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. See Virginia Code §56-600.

[7] Order at 13.

to pay for, but gain no benefit from, conservation and energy efficiency programs and thus make the ECP "cost effective." The Commission concluded that the reallocation of funds would address the potential deficiencies in the Plan identified by the RIM Test."[8]

The Commission acknowledged that the CARE Plan includes a normalization component that removes the effect of weather from the determination of conservation and energy efficiency results as required by §56-602(A)(i). The Commission also found that the CARE Plan only applies to the residential class of customers and that no other class of customer will be adversely affected by the Plan as required by §56-602(A)(iv). Similarly, the Commission found that the plan is "revenue neutral" as defined in the Act.

In approving the CARE Plan, the Commission authorized the formation of an Energy Conservation and Efficiency Advisory Group that will meet periodically to evaluate, review and recommend adjustments to the VNG's conservation and energy efficiency programs. The Commission also accepted a stipulated condition that VNG will not earn a return or recover any form of carrying costs on deferred incremental costs incurred for its conservation and energy efficiency programs within the 3 year effectiveness of the CARE Plan. The ECP costs, excluding carrying costs, are to be included in VNG's next rate proceeding as an expense for recovery over an amortized period. The deferred ECP costs will not be classified as rate base in VNG's next rate proceeding.

Finally, in response to concerns that the CARE Plan was inconsistent with the non-gas rate freeze established in VNG's existing PBR Plan,[9] the Commission concluded that the Act explicitly permits a natural gas local distribution company ("LDC") to implement a CARE Plan regardless of whether the LDC is operating under a Commission approved PBR Plan. ❋

About the author: James (Jim) S. Copenhaver is Assistant General 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.

[8] Order at 13 - 14.

[9] See *Application of Virginia Natural Gas, Inc. For approval of a performance based rate regulation methodology pursuant to Virginia Code §56-235.6*, Case No. PUE-2005-00057 and *General Rate Case Filing of Virginia Natural Gas, Inc. For investigation of justness and reasonableness of current rates, charges, and terms and conditions of service in compliance with prior Commission Order*, Case No. PUE-2005-00062.

Take me out to the ballgame…

Please join your fellow members of the Administrative Law Section for the 27th Annual National Regulatory Conference in Williamsburg, Virginia titled, ***The Future Ain't What it Used to Be*** — Evaluating what lies ahead for utilities, industry and ratepayers in today's challenging times. Channeling the gone, but not forgotten spirit and words of baseball legend, Yogi Berra, the conference will begin with an Opening Address by Robert Bryce, Author of *Gusher of Lies: The Dangerous Delusions of Energy Independence.*

The conference will address timely topics such as the ***Frozen Credit: What Awaits Us When the Credit Markets Thaw?*** *(A nickel ain't worth a dime anymore),* ***The Future of Fuel in Virginia*** *(I wish I had an answer to that, because I'm tired of answering that question),* ***35 Cents, Please -Telecom Regulations and Resources: 2008-2012*** *(If you don't know where you're going, you'll wind up somewhere else),* and Integrated Resource Plans (*It's déjà vu all over again).*

As always, the conference will provide 2 hours of ethics CLE. This year's ethics "game" will take the form of a Family Feud, where it will be three strikes you're out.

Bring your peanuts and Cracker Jacks and hope to see you there…

We hope to see you there. Registration materials and more information will be mailed in March. If you have any questions, please contact this year's chair of NRC Planning Committee Vishwa B. Link (vlink@mcguirewoods.com). ❋

Commission Issues Guidelines For Integrated Resource Plans

By Ashley B. Macko

Legislation passed by the General Assembly in 2008 requires all investor-owned electric utilities to file integrated resource plans by September 1, 2009, and at least every two years thereafter.[1] Virginia Code § 56-597 defines an IRP as "a document developed by an electric utility that provides a forecast of its load obligations and a plan to meet those obligations by supply side and demand side resources over the ensuing 15 years to promote reasonable prices, reliable service, energy independence, and environmental responsibility." The same legislation directs the State Corporation Commission to issue guidelines for the filing of IRPs. On November 12, 2008, the Commission issued an Order Proposing Guidelines and Directing the Filing of Integrated Resource Plans that directed the applicable utilities[2] to file IRPs by September 1, 2009 and requested comments on certain proposed IRP Guidelines by December 12, 2008.[3]

Thirteen parties filed comments[4] and the Commission issued an Order Establishing Guidelines for Developing Integrated Resource Plans on December 23, 2008.[5] At the outset, the Commission noted that the Guidelines do not represent filing requirements issued as part of the Virginia Administrative Code and that the guidelines do not limit the information the Commission may find reasonable and relevant as part of each individual utilities' cases.[6] Further,

> we also clarify that the exclusion from the guidelines herein of any comments or recommendations received in this matter does *not* represent a rejection of such request for purposes of any particular subsequent IRP case. Rather, such issues may be raised – and addressed by all participants and the Commission – as part of the specific IRP case filed by the utility.[7]

The Commission largely adopted the original form of the proposed Guidelines, but with several modifications. The Commission clarified that the comprehensive analysis of all existing and new resource options should include "costs, benefits, risks, uncertainties, reliability and customer acceptance where appropriate" considered and chosen by the utility to provide reliable electric utility service at "the lowest reasonable cost."[8] In considering supply side resources, the Commission clarified that the IRP should include a narrative description of the driver(s) underlying such anticipated changes such as expected environmental compliance, carbon restrictions, technology enhancements, etc."[9] For major capital improvements, such as the addition of scrubbers, those "shall be evaluated through the IRP analysis to assess whether such improvements are cost justified when compared to other alternatives, including retirement and replacement of such resources."[10]

With respect to evaluation of resource options, the Commission added that "IRP filings should identify and include forecasted transmission interconnection and enhancement costs associated with specific resources evaluated in conjunction with the analysis."[11]

The Commission also added a caveat concerning data availability: "To the extent the information requested is not currently available or is not applicable, the utility will clearly note and explain this in the appropriate location in the plan, narrative, or schedule."[12]

Notwithstanding several comments in opposition, the Commission opted to maintain the requirement in the Guidelines that requires, in years when an IRP is not required to be filed, each utility to file a narrative summary describing any significant event necessitating major revision to the most recent IRP.

Under the applicable statute and the Guidelines, the incumbent electric utilities will file their individual integrated resource plans by September 1, 2009. ❊

[1] *See* 2008 Va. Acts ch 476, 603; Va. Code §§ 56-597- 599.

[2] The investor owned electric utilities are: Appalachian Power Company, Kentucky Utilities Company d/b/a Old Dominion Power Company, The Potomac Edison Company d/b/a Allegheny Power, and Virginia Electric and Power Company d/b/a Dominion Virginia Power.

[3] That Order also noted that the legislation directed each utility, as part of the 2009 IRP, to "assess governmental, nonprofit, and utility programs in its service territory to assist low income residential customers with energy costs and shall examine, in cooperation with relevant governmental, nonprofit, and private sector stakeholders, options for making any needed changes to such programs." *Commonwealth of Virginia, ex rel. State Corporation Commission Concerning Electric Utility Integrated Resource Planning Pursuant to §§ 56-597 et seq. Code of Virginia*, Case No. PUE-2008-00099, Order Proposing Guidelines and Directing the Filing of Integrated Resource Plans (Nov. 12, 2008), p. 1.

[4] Appalachian Power Company, Kentucky Utilities Company d/b/a Old Dominion Power Company, the Office of the Attorney General, Division of Consumer Counsel, the Potomac Edison Company d/b/a Allegheny Power, the

— footnotes continued on page 9

Renewable Options for APCo and DVP Customers

By Kiva Bland Pierce

In 2008, both Virginia Electric and Power Company d/b/a Dominion Virginia Power ("DVP") and Appalachian Power Company ("APCo") filed applications seeking approval of renewable energy tariffs pursuant to Virginia Code §§ 56-245.1:2 and 56-577.A.5.[1] These statutory provisions, enacted in 2008 and 2007, respectively, require electric utilities to provide retail customers renewable energy information and the ability to purchase renewable energy beginning January 1, 2009. The main question in both proceedings was one of first impression before the Commission: whether or not the proposed options qualified as "electric energy provided 100 percent from renewable energy" under § 56-577.A.5. Such a determination would allow DVP and APCo to be the exclusive providers of renewable energy in their certificated territory. If the proposed tariff options did not qualify, then a competitive service provider who had a 100% renewable energy option would be able to offer this option to DVP and APCo's customers.

Both companies proposed to use renewable energy credits ("RECs") to account for the customer's renewable energy purchases. APCo indicated that it would use RECs from its Summersville Hydro Project located in West Virginia. DVP would enter into a contract with a third-party who would be responsible for purchasing and monitoring the RECs. While not identical, the options proposed by the companies were similar. Both DVP and APCo planned to offer two options to its customers: purchase blocks of renewable energy to cover a portion of the monthly usage or purchase renewable energy to cover 100% the monthly usage. For the block option, APCo customers could purchase 100 kWh blocks for $1.50 while DVP customers could purchase $2.00 blocks. For the 100% option, APCo customers would pay $0.015 per kWh for the entire monthly consumption. DVP customers' price for the 100% option would be based upon the purchase of the RECs pursuant to the contract with the third-party. The renewable energy charges would be in addition to the usual fuel charge associated with the monthly usage.

The procedural schedules allowed for comments but not testimony. In the DVP case, the Fairfax County Board of Supervisors, Robert A. Vanderhye, and Pepco Energy Services, Inc. filed comments objecting in some form to the application. In the APCo proceeding, Public Policy Virginia, Inc., represented by Mr. Vanderhye, and Michel A. King filed comments objecting to the application at some level.

The Commission scheduled oral argument on both proceedings on November 12, 2008. The arguments focused on, first, whether the use of RECs would qualify as renewable energy, and second, would the 100% options qualify under § 56-577.A.5 to end competitive service for renewable energy. DVP and APCo argued that RECs did qualify as renewable energy and that their respective options would allow a customer to purchase 100% renewable energy. In the DVP case, Robert A. Vanderhye challenged the argument that there was a true 100% option while in the APCo proceeding, Public Policy of Virginia, Inc. made that challenge. Additionally Mr. King argued not only that it wasn't a true 100% option, but that RECs did not qualify as renewable energy. The Commission Staff noted that an ambiguity existed.

On December 3, 2008, the Commission entered orders in both proceedings approving the proposed tariffs but found that the proposals did not constitute "electric energy provided 100 percent from renewable energy" under § 56-577.A.5. In reaching this conclusion, the Commission looked to the plain language of the statute, the treatment of renewable energy and RECs in § 56-577.A.5 as well as § 56-585.2.A, and RECs in general. The Commission found that RECs are not "electric energy" as the term is used in § 56-577.A.5 and thus do not qualify as electricity provided from 100% renewable energy. As a result, competitive service providers may offer a 100% renewable energy option to the customers of DVP and APCO. The tariffs became effective January 1, 2009. ❋

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[1] *Application of Virginia Electric and Power Company d/b/a Dominion Virginia Power For approval of its Renewable Energy Tariff*, Case No. PUE-2008-00044; *Application of Appalachian Power Company For approval of its Renewable Power Rider*, Case No. PUE-2008-00057.

Columbia Gas's Request for Experimental WNA Denied Case No. PUE-2008-00074

By Ashley B. Macko

The State Corporation Commission recently declined to approve an application by Columbia Gas of Virginia, Inc., to implement an experimental weather normalization adjustment. CGV filed the application in August, asserting that the proposed WNA met the requirements of Va. Code § 56-234 that "such experiments are necessary in order to acquire information which is or may be in furtherance of the public interest." Specifically, CGV cited several unique characteristics of its proposed WNA including use of six weather stations to derive the most geographically representative actual weather data; pricing weather normalized usage through the normal billing routine rather than the weighted average margin; calculation of the WNA on a customer-specific basis; administration of the WNA through a monthly billing process and application to only five weather-sensitive months.[1] The overall goal of the WNA, according to CGV, was to stabilize its residential and small commercial customers' bills and the Company's revenues by eliminating the impact of weather on the non-gas portion of customers' bills in December through April.[2]

Commission Staff filed testimony in the case concluding that the Commission has the discretion to approve the proposed WNA as an experiment.[3] Commission Staff also found that the WNA would affect the Company's current Performance Based Rate Plan ("PBR") that includes a provision for revenue sharing should the Company earn over a set amount in a given year.[4] Specifically, Staff asserted that the WNA would make it less likely that any sharing will take place under the PBR plan and as a result, the proposed WNA would not be revenue neutral on either an inter-class or an intra-class basis.[5]

On December 5, the Chief Hearing Examiner issued a Report recommending approval of the proposed WNA as an experiment.[6] The Chief Hearing Examiner outlined the history of experimental WNAs in the Commonwealth analyzing those that were approved and those that were rejected. Citing largely the Commission's recent approval of an experimental WNA for Virginia Natural Gas's General Service customers in Case No. PUE-2006-00095, the Hearing Examiner ultimately concluded that the proposed WNA, as modified by other recommendations in the report, was necessary to acquire information which is or may be in furtherance of the public interest and should be implemented as an experiment for a period of two years.[7]

On January 12, 2009, the Commission issued a Final Order denying the application, finding approval to be incompatible with the existing four-year PBR plan.[8] The Commission outlined the terms of the PBR which, in its broadest terms include a freeze of non-gas rates and revenue sharing when the Company earns above a specified return on equity. "The proposed WNA, however, would effectively modify the non-gas rates that customers otherwise would have paid under the four-year PBR Plan previously requested by the Company and approved by the Commission."[9] While acknowledging that every other Virginia natural gas utility has implemented a WNA on either an experimental or permanent basis, the Commission noted that "CGV would be the *only* Virginia natural gas utility to implement its initial WNA *after* it had asked for, and received the Commission's approval of, a PBR Plan."[10]

Moreover the Commission found that "the WNA not only effectively modifies the non-gas rates that customers otherwise would have paid under the PBR Plan, the WNA may directly reduce the benefits that customers currently receive under the PBR Plan."[11] The Commission noted that CGV could have requested the WNA when it proposed the PBR and both could have been considered together by the Commission. "In effect, Columbia's application for a WNA now, after its proposed PBR Plan was approved and put in place, amounts to a request for single-issue ratemaking, which we find it not in the public interest under the facts in

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1 *Application of Columbia Gas Of Virginia, Inc. For Approval Of An Experimental Weather Normalization Adjustment Mechanism Pursuant to § 56-234 Of The Code Of Virginia,* Case No. PUE-2008-00074, Application (Aug. 1, 2008), pp. 3-4.
2 *Id.* at 3.
3 Pre-filed Testimony of Gregory L. Abbott (Sept. 29, 2008), pp. 8-9.
4 *Id.* at 13. For more details on the PBR plan, see Case No. PUE-2005-00098.
5 *Id.*
6 Report of Deborah V. Ellenberg, Chief Hearing Examiner (Dec. 5, 2008), p. 21.
7 *Id.* at 18, 21.
8 Final Order (Jan. 12, 2009).
9 *Id.* at 7.
10 *Id.* at 8 (emphasis in original).
11 *Id.* at 8.

For Local Exchange Carriers, Commission Adopts Higher Bad Check Fee, Declines to Increase Late Charge By Ashley B. Macko

The State Corporation Commission has adopted New Rules Governing Late Payment and Bad Check Charges for Local Exchange Telephone Companies, 20 VAC 5-414-10 *et seq.*[1] In response to a petition filed by the Virginia Telecommunications Industry Association, the Commission initiated the proceeding to consider VTIA's request to increase the allowable bad check charge and late payment charge. Specifically, VTIA requested the maximum bad check charge increase from $6.00 to $30.00 and the late payment charge increase from 1.5% of the outstanding balance to either a late payment fee of 1.5% of a customers unpaid charge or $5.00 per bill for residential accounts and $20.00 per bill for business accounts.

The Commission found that the $30.00 bad check fee should be adopted, but declined to adopt an increase to the late payment fee. With respect to the $30.00 bad check charge, the Commission noted that public bodies are authorized by the General Assembly to charge a bad check penalty of up to $35.00 and that none of the commenting persons objected to the proposed increase.[2] With respect to the proposed late payment fee, however, the Commission found that:

> no analysis has been provided as to whether the current 1.5% late payment fee limitation (which equates to an annual rate of 18%) prohibits Virginia's local exchange telephone companies from recouping their actual costs associated with late payments (including collection costs that may be incurred as a result of the choice of some consumers to delay their payment of local exchange telephone bills while electing to pay other bill to avoid higher late payment fees).[3]

On December 5, 2008, VTIA filed a petition for reconsideration seeking a modification to the Commission's determination not to increase the allowable late payment charge. The Commission granted the petition for purposes of maintaining jurisdiction and requested additional comments. Ultimately, however, on January 29, 2009, the Commission issued an Order on Reconsideration which declined to make any modification to the earlier decision. ❊

[1] *Commonwealth of Virginia ex rel. State Corporation Commission, Ex Parte: Adoption of New Rules Governing Late Payment and Bad Check Charges for Local Exchange Telephone Companies,* Case No. PUC-2008-00054, Order Adopting Amended Rules (Nov. 17, 2008).
[2] *Id.* at 2.
[3] *Id.* at 5.

Integrated Resource Plans *(continued)*

Virginia Chapter of the Sierra Club, the Southern Environmental Law Center, the Virginia Committee for Fair Utility Rates, Virginia Electric and Power Company d/b/a Dominion Virginia Power, the Virginia Energy Providers Association, the Virginia Independent Power Producers, Washington Gas Light Company and 2 individuals.
[5] *Commonwealth of Virginia, ex rel. State Corporation Commission Concerning Electric Utility Integrated Resource Planning Pursuant to §§ 56-597 et seq. Code of Virginia*, Case No. PUE-2008-00099, Order Establishing Guidelines for Developing Integrated Resource Plans (Dec. 23, 2008).
[6] *Id.* at 2.
[7] *Id.* (emphasis in original).
[8] Guidelines, p. 2.
[9] Guidelines, p. 6.
[10] Guidelines, p. 6.
[11] Guidelines, p. 8.
[12] Guidelines, p. 3.

State Corporation Commission Adopts Revised Rate Case Rules

By Patrick L. Gregory

On December 16, 2008, the State Corporation Commission issued an Order Adopting New Regulations in its rulemaking concerning the "Rules Governing Utility Rate Applications and Annual Informational Filings" (the "rate case rules").[1] The Order adopted a new set of regulations to replace the previous ones, effective January 1, 2009.[2] The rulemaking was initiated by the Commission in early 2008 in response to the General Assembly's 2007 legislation ("2007 Legislation") effectively re-regulating incumbent electric utilities in the Commonwealth, which includes a new method for the review of electric utility rates, new cost-recovery mechanisms (including certain financial incentives) for recovery of capital and operating costs, and the expansion of prior law governing performance-based regulation for gas utilities to include electric utilities within its scope.[3] While much of the rate case rules remain unchanged, there are some important differences.

Notice Requirement

Many types of rate filings are now subject to a new notice requirement.[4] A "notice of intent" to make such filings must be given sixty days prior to the filing date. Filings requiring this notice include general and expedited rate increase applications, optional performance-based regulation applications, and conservation and ratemaking efficiency plans, as well as rate adjustment clause filings. The contemplated rate adjustment clause filings are a result of the 2007 Legislation, which allows for specific methods of cost recovery for certain transmission services, deferred environmental and reliability costs, conservation programs, renewable energy sources, and for costs related to the planning, development and construction of certain types of new electric generation facilities and major modifications to certain existing generation facilities.[5]

Electronic Spreadsheets

Many of the schedules required to be filed under the new rules must take the form of electronic spreadsheets.[6] Such schedules include those related to market data, cash flow data, rate of return statements, and rate base statements. The Commission considered a suggested requirement that electronic spreadsheets be provided in Microsoft Excel format.[7] While it acknowledged that Excel was the industry standard for such spreadsheets, the Commission stated that "such standards change over time – sometimes quickly – and thus specifying a proprietary product in our rules may not be appropriate." The new rules require only that the spreadsheets be "commercially available and have common use in the utility industry."

Performance Based Regulation

The new rules state that applicants filing applications for performance-based regulatory plans ("PBRs") must nonetheless file rate schedules with the Commission.[8] Some utility respondents objected to this provision, arguing that this requirement was inconsistent with the PBR statute, which they asserted was to be a departure from cost-of-service ratemaking.[9] PBR rates are subject to a "not excessive" benchmark rather than the "just and reasonable" benchmark used in cost-of-service ratemaking. Yet, the Commission noted that it is authorized to discontinue a PBR if its rates (relative to its benefits) are found to be excessive when compared to cost of service. The SCC asserted that rate schedules were necessary for it to be fully informed when making such a determination.

Rate Adjustment Clause Filings

Applicants that are filing for rate adjustment clauses ("RACs") under the re-regulation law must provide documentation listed in Schedules 45 and 46 of the new rules.[10] This change is primarily driven by the peer group methodology specified in the 2007 Legislation as part of the process for determining fair rates of return on common equity. Schedule 45 requires a complete list of peer group utilities with returns

— *continued on next page*

[1] *In the matter of revising the rules of the State Corporation Commission governing utility rate increase applications pursuant to Chapter 933 of the 2007 Acts of Assembly*, Case No. PUE-2008-00001, Order Adopting Regulations (December 16, 2008)(hereinafter "Order").
[2] The new rules appear at 20 VAC 5-201-10 et seq., replacing the previous ones at 20 VAC 5-200-30 ("the old rules").
[3] *In the matter of revising the rules of the State Corporation Commission governing utility rate increase applications pursuant to Chapter 933 of the 2007 Acts of Assembly*, Case No. PUE-2008-00001, Order For Notice and Comment (January 29, 2008).
[4] 20 VAC 5-201-10 A.
[5] *See, e.g.*, Va. Code § 56-585.1.A.
[6] 20 VAC 5-201-10 H.
[7] Order Adopting Regulations at 5.
[8] 20 VAC 5-201-40.
[9] Order Adopting Regulations at 6.
[10] 20 VAC 5-201-60. *See also*, Va. Code § 56-585.1

calculated for each year within the required three-year period, and Securities and Exchange Commission documents in which the returns are reported. Also required are a detailed explanation of why utilities were excluded from the proxy group, and a spreadsheet showing how the returns were calculated. Schedule 46 requires an applicant to provide a schedule of all project costs by type of cost and year associated with each RAC, along with supporting documentation. Applicants must also provide the annual revenue requirement over the duration of the proposed RAC by year and class.

Conservation and Ratemaking Efficiency Plans

The 2008 General Assembly passed the "Natural Gas Conservation and Ratemaking Efficiency Act" ("CARE Act"), with the intent of encouraging natural gas utilities to file conservation and ratemaking efficiency plans. In July of 2008, the Commission Staff proposed rules to address the new CARE Act as it relates to the rate case rules.[11] These rules were adopted and require natural gas utilities filing such plans to file documents listed in Schedule 48 of the new rules.[12] This schedule requires information including a revenue or class cost of service study and a sample billing analysis detailing the effect of the proposed rates, tariff design or mechanism related to the efficiency plan, as well as applicable tariff pages. Applicants must provide narratives concerning weather effects, the proposed decoupling mechanism, provisions addressing needs of low-income or low-usage residential customers, and provisions ensuring that rates and services to nonparticipating customers will not be adversely impacted.

Revenue and Expense Variance Analysis

Many applications subject to the new rate case rules require compliance with Schedule 30, "Revenue and Expense Variance Analysis." While such analysis was required under the previous rules, there is a significant change in the new version.[13] Previously, the analysis applied to test period expense items greater than .01% of total operation and maintenance expenses for utilities with O&M expenses exceeding $100 million, and .1% of total O&M expenses for utilities with less than $100 million O&M expenses. The new rules eliminate the $100 million threshold, simply requiring expense variance analysis of test period expense items greater than .1% of O&M expenses, excluding fuel factor and purchased gas adjustment costs. While some respondents proposed that a threshold be included in the new rules, the Commission asserted that smaller dollar items were "equally material" to the O&M expenses used in determining cost of service.[14] Schedule 30 also now requires an applicant to have a ledger or schedule of all accounts payable for review at the applicant's office as of the filing date.

Workpapers for Earnings Test and Ratemaking Adjustments

Schedule 29, required for many applications under the new rate case rules, concerns "Workpapers for Earnings Test and Ratemaking Adjustments."[15] Applicants must now provide a narrative explaining the purpose and methodology for each adjustment. The narratives must reference any relevant Financial Accounting Standards Board ("FASB") statement or Commission precedent, if known or available.

As several changes and additions have thus been made concerning rate case filings, all concerned parties should be aware of these new requirements. ❋

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[11] *In the matter of revising the rules of the State Corporation Commission governing utility rate increase applications pursuant to Chapter 933 of the 2007 Acts of Assembly*, Case No. PUE-2008-00001, Staff Report (July 15, 2008).
[12] 20 VAC 5-201-85. *See also* Va. Code § 56-600 et seq.
[13] Such analysis appeared in the old rules at Schedule 22.
[14] Order Adopting Regulations at 7.
[15] Such workpapers were discussed in Schedule 21 of the old rules.

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the foundation would be evaluated according to the extent to which it meets a substantial portion of various criteria, which include the following:

> *1. Whether, and to what extent, the proposed project will identify, develop, and facilitate production and marketing of* ***alternative fuels, clean energy sources, reduced dependence on foreign energy supplies, more affordable energy, discovery and development of raw materials necessary for energy production****, or other similar improvements in energy creation, production, distribution and affordability;*
>
> *2. Whether, and to what extent, the proposed project will aid in* ***economic revitalization of economically disadvantaged areas;***
>
> *. . .*
>
> *5. The* ***cost*** *of the proposed project in relation to its reasonably foreseeable* ***economic impact;***
>
> *. . .* [1]

These criteria illustrate the internal tensions that exist when trying to achieve traditional economic objections and sustainability objectives. Put another way, this list illustrates why it isn't easy being green.

(1) promoting "alternative fuels" *and* "clean energy sources" *and* "reduced dependence on foreign energy supplies" *and* "discovery and development of raw materials necessary for energy production"

The difficulty in attempting to promote all of these objectives is illustrated by a hotly debated issue at the cross roads of sustainability and energy: should nuclear energy and "clean coal" be considered sustainable? Those who argue that they are sustainable note that these forms of electricity generation would reduce carbon emissions as compared to conventional coal generation. Those who argue they are not sustainable point out that they have waste issues not associated with alternative energy sources like wind or solar power.

The outcome of this debate has particular significance in Virginia for many reasons, including the following. First, electricity prices have historically been less expensive in Virginia than in many other states because a significant portion of Virginia's baseload generation comes from nuclear and coal powered plants.[2] Second, in 2007 the General Assembly passed legislation[3] containing financial incentives in the form of enhanced returns on equity for the construction of new nuclear or clean coal generation.[4] Third, Virginia has what the Washington Post has described as "a geological discovery in its backyard that could drastically change the nation's reliance on foreign oil."[5] An estimated 110 million pounds of uranium in Pittsylvania County, worth almost $10 billion, is thought to be the largest deposit of uranium in the United States and could supply all of the country's nuclear power plants for about two years.[6] Although there is currently a ban on uranium mining in Virginia, on November 8, 2008, the General Assembly's Virginia Coal and Energy Commission appointed a subcommittee of its members to oversee a wide-ranging study on the impact of uranium mining in Virginia. This study is being conducted to assist the Coal and Energy Commission in its determinations and recommendations on the appropriate policy for the Commonwealth.[7]

Currently, it looks like Virginia is destined to come down on the side of nuclear and coal as part of its energy solution. Governor Kaine, whose administration has emphasized sustainability, says that nuclear-power workers hold green jobs since nuclear power does not produce gases linked to global warming.[8] The State Corporation Commission ("SCC") has recently approved Virginia Power's Wise County coal plant, and construction on that plant is underway despite an appeal of the SCC's decision in the Virginia Supreme Court.

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1 http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2404&Submit2=Go

2 See, e.g. Electricity Rate Comparison by State as of July 2008, compiled by Nebraska Energy Office based on data from Electric Power Monthly prepared by Energy Information Administration, http://www.neo.ne.gov/statshtml/115.htm (showing Virginia's average price as 8.91¢/kWh compared with 10.68¢/kWh as the national average, with 5.66¢/kWh as the lowest state average and 31.56 ¢/kWh as the highest state average). See also, Average Retail Price of Electricity to Ultimate Consumer by End-Use Sector, by State prepared by Energy Information Administration (Official Energy Statistics from the U.S. Government), http://www.eia.doe.gov/cneaf/electricity/epm/table5_6_a.html (showing average Virginia price as 8.58 ¢/kWh as compared to 9.73¢/kWh national average).

3 See 2007 Va. Acts ch. 888, 933.

4 The financial incentives are codified at Va. Code § 56-585.1 (providing minimum and maximum time periods for enhanced rates of return: 200 basis points for nuclear-powered generation facility between 12 to 25 years; 200 basis points for carbon capture compatible, clean-coal powered generation facility between 10 to 20 years; 200 basis points for renewable powered generation facility between 5 to 15 years; 100 basis points for conventional coal or combined-cycle combustion turbine between 10 to 20 years).

5 "Uranium Lode in Va. is Feared, Coveted," by Anita Kumar, The Washington Post, January 2, 2008, at B1, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/01/AR2008010101811_pdf.html.

6 Id.

7 http://dls.state.va.us/groups/cec/Uranium/meetings.htm

8 "A look at how, or if, 'green' can boost jobs, help environment," by Rex Springston, Richmond Times Dispatch, February 15, 2009.

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(2) promoting "affordable energy" *and* evaluating "the cost of the proposed project in relation to its reasonably foreseeable economic impact"

Another area of controversy raised by the juxtaposition of traditional energy regulatory objectives and sustainability objectives is cost to the customer of the regulated utility service. Replacing lower cost baseload generation with more expensive wind and solar generation may raise cost and reliability issues that put traditional regulatory objectives at odds with sustainability objectives. H.B. 2404 is unique among the energy and sustainability bills in the 2009 General Assembly Session because it contains the phrase "affordable energy."

The lack of explicit focus on "affordable energy" in many of the 2009 session's energy bills suggests that what may have been lost in the rush to adopt sustainability measures is this question, which is a key issue for traditional regulation: who will end up footing the bill? Based on legislation being considered at the time this article is written, it will not be utility shareholders: there are several bills allowing for rate increases as soon as the utility incurs costs, and in some instances, for proposed costs.[9] Instead, it will be the utility's customers, and that can be problematic for several reasons.

First, there is a fairness issue. If customer A has invested a lot of money in energy conservation measures, and then its utility starts charging for efficiency programs that other customers will utilize, isn't customer A being forced to subsidize those other customers? In other words, isn't customer A finding out the hard way that it isn't easy being green?

Second, there is a "fox in the hen house" issue. Utilities earn more money when customers use more energy. In fact, in Virginia, utilities can earn bonuses for building new nuclear power plants and clean coal plants. So why is it a good idea to put them in charge of energy efficiency and conservation programs? It certainly makes sense to put them in charge of the wires and the juice to run the electricity system: that's a monopoly service that has been left to the utilities, now that Virginia has largely abandoned its venture into de-regulation.[10] But utilities are not the only ones who can offer energy efficiency and conservation programs, and putting them in charge of such programs can seem counter-intuitive.

Third, there is the "arms race" issue. The 2007 legislation gave utilities financial incentives to build new generation. Several of the bills in this year's General Assembly session seem designed to put conservation and efficiency measures on the same footing by giving utilities bonus points for implementing these measures, too.[11] What's the end result? The utility customer pays more for new generation and for conservation measures that the utility, which has an obligation to furnish reasonably adequate service and facilities at reasonable and just rates, should arguably be doing anyway. Another way to put generation and conservation measures on an equal footing would be to take away ALL automatic bonus points. If added incentives are needed, for instance, to procure financing for a new baseload power plant, then such incentives could be approved once the need for the incentives has been demonstrated.

(3) Open Questions

Basically, it isn't easy being green because there are can be unintended consequences when electricity regulation designed to achieve just and reasonable rates is tasked with achieving sustainability objectives, too. Here are some of the questions that the headlong rush to embrace sustainability raises:

(1) Will peak shaving measures actually reduce the peak, or will they just move the peak to another time period?

(2) What are the "true" costs of solar vs. wind vs. nuclear vs. coal? Solar, wind, and other renewable energy sources cost more now, particularly if you factor in the cost of upgrading the transmission system. But their fuel costs in future years are zero, and fuel costs have been the cause of significant rate increases in Virginia in recent years. When you factor in fuel costs for traditional generation in the out years, what is the price differential between "really green" and "not so green" generation?

(3) What is an accurate accounting of green energy jobs? How much of the incentive money used for creating green energy jobs will reduce activities that could create other jobs?

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9 See, e.g. Senate Bill 1339 in 2009 General Assembly Session, providing for utilities to recover the costs of designing and operating demand management, conservation, energy efficiency, and load management programs, including an enhanced rate of return of 200 basis points for between three and ten years for investments in energy efficiency programs, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=sb1339&Submit2=Go

10 2007 Va. Acts ch 888, 933 from the 2007 General Assembly Session established a new mechanism for regulating the rates of investor-owned electric utilities.

11 See, e.g. Senate Bill 1339 in 2009 General Assembly Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=sb1339&Submit2=Go

It Isn't Easy Being Green *(continued)*

Will green energy raise electricity rates and make the operating margins for manufacturing industries even more precarious, resulting in the loss of manufacturing jobs?

(4) If the SCC is tasked with encouraging the optimal production of renewable energy, does that undermine its current obligation to ensure just and reasonable rates?

By the time you read this article, the General Assembly will likely have completed its consideration of sustainability issues for this year, and the Governor may have issued one or more executive orders to further his Renew Virginia initiative. These actions will undoubtedly impact how sustainability objectives are achieved through state policy and regulation. Having these measures based on an informed consideration of consumer, utility, and environmental issues would help ensure the best results for Virginia. ❋

About the Author: Ms. Robb is Chair of the Sustainability: Energy & Green Development Group at Christian & Barton, LLP, which helps businesses and governmental entities position themselves to pursue sustainable energy and development practices.

State Corporation Commission Adopts Amended Net Metering Regulations

By Ashley B. Macko

On August 7, 2008, the State Corporation Commission adopted amended regulations governing net energy metering. The amendments were necessitated by statutory changes made by the General Assembly in 2007 which (1) increased the amount of total aggregate generation capacity allowed for net metering customers from 0.1% to 1% of the utility's adjusted Virginia peak-load forecast in the previous year and (2) required the utility, if requested by a customer, to enter into a contract to purchase the excess generation that exceeds the customer's own usage for the 12-month net metering period at a rate approved by the Commission, unless the parties agree to a higher rate.

The Proposed Rules, as originally drafted, required the purchase of excess generation from net metering customers to be at a rate of the system-wide PJM day-ahead annual, simple average Locational Marginal Price ("LMP").[1] A number of commenting parties disagreed about the appropriate rate for purchase of excess generation. Ultimately, the Commission modified the Proposed Rules to require "a rate equal to the PJM zonal day-ahead annual, simple average LMP for the load zone within which the electric distribution company's Virginia retail service territory resides."[2] The Commission reasoned that "a payment rate equal to each individual electric distribution company's PJM zonal LMP is preferable to the system-wide PJM LMP and more accurately reflects the market conditions in each zone and the avoidable energy cost of the investor-owned utilities."[3] For the Cooperatives, on the other hand, the Commission recognized that they do not buy power from or sell power to the PJM energy markets and therefore, the appropriate rate for purchasing excess generation should be the avoidable energy cost based on each Cooperative's wholesale power purchase agreement.[4]

In addition, the Commission adopted a regulation to require any excess energy payment by the electric distribution company within 30 days.[5] The Rules also allow the company to offer the net metering customer the choice of either an account credit or direct payment for any excess generation.[6] ❋

[1] *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: In the matter of amending regulations governing net energy metering*, Case No. PUE-2008-00008, Order Adopting Final Regulations (Aug. 7, 2008), p. 3.

[2] *Id.* at 4. In cases where service is not within a PJM load zone, the Commission determined to maintain a rate equal to the PJM system-wide LMP.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 5.

[6] *Id.*

Commission Adopts Revised Rules Governing Applications to Construct and Operate Electric Generating Facilities By Ashley B. Macko

On December 23, 2008, the Commission adopted revised Rules applying to applications to construct and operate electric generating facilities, effective January 15, 2009. In light of comments received, the Commission made a number of modifications to the initial proposed Rules.

The Commission adopted the suggestion of the Office of the Attorney General, Division of Consumer Counsel that would require a motion for protective order to be filed simultaneously with the application if the application contains any information designated by the applicant to be confidential.[1] This will facilitate access to the confidential information in a timely manner. The Commission also adopted the suggestion of Columbia Gas of Virginia, Inc., that the Commission make explicit in the Rules that an applicant seeking to construct a natural gas-fired electric generation facility serve a copy of its application on all natural gas local distribution companies in whose service territories the proposed facility will be located.[2]

The Old Dominion Electric Cooperative took issue with references in the proposed Rules to the "incumbent electric utilities" as defined by § 56-576 of the Code and suggested the provisions should be applicable, more accurately, to "regulated utilities whose rates are regulated pursuant to § 56-585.1." of the Code. The Commission agreed and made clarifying revisions.[3]

The Commission found that information required should include front-end engineering and design studies supporting the specific plant design as well as plant type and site selected. The Commission determined to only require the *initial* engineering and design studies and *initial* fuel supply studies, reasoning that updates would be provided during the case proceeding and also obtainable through discovery.[4]

The Commission declined to adopt a proposal that would modify the need requirement applicable to proposed renewable energy facilities to require demonstration of "need for the plant in meeting the incumbent electric utility's RPS Goals as set forth in § 56-585.2 of the Code of Virginia."

The Commission reasoned that:

> the proposed language in inconsistent with the provisions of § 56-580 D (ii), which require that the certification of generation facilities proposed by utilities regulated under § 56-585.1 . . . proceed upon a finding that such facilities are required by the "public convenience and necessity. We find that this statutory requirement is satisfied by ensuring that utilities provide traditional load and generating capacity reserve information demonstrating the need for the plant in that in-service year proposed, irrespective of the type of facility proposed.[5]

The Commission also reiterated its desire to streamline generation project applications and adopted the proposed Rule that permits facilities with rated capacities of 5 MW or less to be constructed without complying with the filing requirements otherwise set forth in the rules.[6] The Commission also adopted streamlined filing requirements with respect to renewable facilities with capacities in excess of 5 MW but less than 100 MW.

Finally, the Commission declined to mandate competitive bidding as part of the filing requirements for new generating facilities, as suggested by one of the commenting parties. While recognizing the merit of such a proposal, the Commission determined that matters regarding mandatory competitive bidding should be addressed in one or more separate proceedings.[7] ❋

1 *Commonwealth of Virginia ex rel. State Corporation Commission, Ex Parte In the matter of revising the rules of the State Corporation Commission governing applications to construct and operate electric generating facilities,* Case No. PUE-2008-00066, Order Adopting Regulations, p. 2.

2 *Id.* at 3.

3 *Id.*

4 *Id*. at 5.

5 *Id*. at 5-6.

6 *Id.* at 6.

7 *Id.* at 9.

State Corporation Commission Issues Second Order for Notice and Hearing In Proceeding Considering Revisions to the Rules for Local Exchange Company Service Quality Standards

By Ashley B. Macko

On December 15, 2008, the Commission issued a Second Order for Notice and Hearing in its Proceeding Considering Revisions to the Rules of Local Exchange Service Quality Standards. The Commission originally issued a procedural order in June 2008 establishing a schedule to consider revisions to the Rules and publishing proposed revised Rules. Multiple parties filed comments on the revised Rules and a public hearing was convened September 25, 2008. In its December 15 Order, the Commission found, as a matter of law, that the "Commission has the legal authority to promulgate minimum service quality standards for local exchange telecommunications ("LECs") operating in the Commonwealth of Virginia."[1] Moreover, the Commission found "as a matter of law the General Assembly has not directed this Commission to leave service quality standards for landline service from LECs solely to the marketplace."[2]

The Commission further found that "protecting the public health and safety and protecting economic well-being should be priorities in ensuring minimum service quality."[3]

> Although the provision of "reasonably adequate service and facilities" is not explicitly limited to public health and safety or economic impacts on customers under the statute, and we do not limit our inquiry to those issues here, we find that it is reasonable to examine further the impact on public health and safety, as well as potential economic impacts, in adopting specific service quality standards.[4]

The Commission attached modifications to the proposed Rules in light of its legal conclusions and comments received during the course of the proceeding and requested additional comments on the revisions. In particular, the Commission sought additional comment on proposed Rule 90 which contains specific performance standards applicable to restoration of out-of-service trouble reports, completion of installation service orders, and field dispatch for installation and repair commitments. "We seek comments on what the specific minimum standards should be for these items, especially in light of our finding that priority should be placed on protecting the public health and safety and minimizing economic impacts of service interruptions in establishing minimum service quality standards."[5]

The revised proposed Rules also include additional provisions regarding repeat trouble reports, central office trouble reports, and outside plan trouble reports. In addition, the Commission modified mandatory reporting under the Rules to only apply for a quarter in which the LEC failed to meet a standard.

The Commission eliminated a proposed Rule relating to network relocation and rearrangement. With respect to that elimination, the Commission sought comment on

> whether it is advisable to limit the present rulemaking to the consideration of service quality subject matter already addressed in the Current Rules and whether we should direct the Staff to convene an industry working group, including representatives from Virginia's electric utilities, to draft guidelines pertaining to the relocation or rearrangement of utility facilities for the Commission's consideration.[6]

Comments on the proposed revised Rules are due March 18, 2009 and a public hearing scheduled for April 2, 2009. ❋

[1] *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Revisions of Rules for Local Exchange Telecommunications Company Service Quality Standards*, Case No. PUC-2008-00047, Second Order for Notice and Hearing (Dec. 15, 2008), p. 2.
[2] *Id.* at 4.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 5.
[6] *Id.* at 6.

Columbia Gas's Request *(continued)*

this case." [12]

CGV subsequently filed a Petition for Reconsideration arguing that the Final Order failed to offer analysis on whether the Company's proposed WNA met the statutory standard for an experimental rate under § 56-234. Further, CGV argued that the Commission's analysis of the impact of the WNA on the PBR was not germane to whether the WNA met the statutory standard. CGV also took issue with the Commission's finding of improper "single-issue ratemaking" in light of § 56-234's express allowance for "rate design tests or experiments."

On January 30, the Commission issued an Order Denying Reconsideration. The Commission rejected the contention that it had found, as a matter of law, that the existence of the PBR Plan precludes approval of an experiment under § 56-234. "Rather, the Commission considered the potential impact – as a factual matter – on the PBR and on the rates in evaluating the experimental WNA under § 56-234 of the Code."[13] Furthermore,

> [T]he Commission must exercise its legislative discretion to determine what is relevant – or "germane" – in evaluating whether a voluntary rate experiment satisfies the statutory standard. In this case, based on the potential impact on the PBR, the concomitant potential impact on rates, and the information that would be acquired from the proposed experiment, we found that such voluntary rate experiment is not "necessary in order to acquire information which is or may be in furtherance of the public interest" under § 56-234 of the Code.[14]

Likewise, with respect to CGV's assertion that it legally erred in rejecting the WNA as single-issue ratemaking, the Commission countered that it had not rejected it as a matter of law, but rather as a matter of the facts of this case. Finally, with respect to any suggestion that the Commission cannot consider the rate impacts of a proposed experiment, the Commission found that the Code "places no such unreasonable limitation on the Commission's exercise of discretion thereunder." ❋

[12] *Id.* at 9.
[13] Order Denying Reconsideration (Jan. 30, 2009), p. 3.
[14] *Id.* at 3-4.
[15] *Id.* at 5.

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."

BREAKING NEWS!!!

SCC ADOPTS REVISED RULES OF PRACTICE AND PROCEDURE

On February 24, 2009 the Commission issued a Final Order adopting revised Rules of Practice and Procedure. For further details, see the Commission's website, referencing Case No. CLK-2008-00002

Telecom Alert

On December 23, 2008, the State Corporation Commission reduced the number of mandatory free directory assistance calls that local telephone companies must provide subscribers from three to two. The Virginia Telecommunications Industry Association had requested the Commission eliminate the requirement altogether, but the Commission was "unable to find just cause for the complete elimination … based on the information that has been provided in this proceeding." SCC Case No. PUC-2008-00046

CLE ALERT:
2009 VIRGINIA STATE BAR ANNUAL MEETING
June 19, 2009

The Administrative Law, Construction Law, Environmental Law, and Local Government Law Sections will be joint sponsors of a CLE program at the 2009 Annual Meeting of the Virginia State Bar at Virginia Beach, Virginia on June 19, 2009. The title of the program will be ***Mega-projects in an Uncertain Economy: Can Local Governments Afford Investment in Environmentally Beneficial Mega Projects in Recessionary Times?***

Mega-projects are generally defined as large-scale infrastructure projects that often require significant public investment. These major undertakings attract widespread public attention and intensive political interest due to the potential benefits and detriments upon local and regional communities, the environment, and budgets. Such mega-projects include rail and rapid transit projects, HOT lanes, energy infrastructure and efficiency projects, port projects, urban renewal projects, and clean water infrastructure. Many of these mega-project proposals have the potential to provide significant environmental benefits. Yet given the condition of state and local budgets and credit markets, can mega-projects move forward while maintaining a proper balance between environmental, developmental, and public investment priorities? This program will explore and wrestle with this question from multiple perspectives. The anticipated speakers will be Richard F. Sliwoski, Director of the Virginia Department of General Services; John Y. Richardson, Jr., Norfolk Deputy City Attorney; James V. McGettrick, Fairfax County Assistant County Attorney; and Trip Pollard, Southern Environmental Law Center.

We hope that interested members of the Administrative Law Section will plan to attend what should be an informative program.

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