

Administrative Law News



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Virginia's Administrative Code is Here!!!

by Rob Omberg

Despite ugly weather, slick roads and the possibility of children going to school until August, this winter season does bring some good news. After years in the making, the Virginia Administrative Code has finally become a reality. Initial shipment of the print and CD-ROM product to state agencies, public libraries and institutions of higher learning started in mid January. The publisher, Lawyers Cooperative Publishing, is now actively marketing the product throughout the Commonwealth.

While a compilation of administrative regulations does not generally invoke excitement, anyone who has navigated the maze of file cabinets containing agency regulations will appreciate the time saving features of this new collection. The Virginia Administrative Code (VAC) finally puts the Commonwealth's regulations into a format accessible and comprehensible to the public.

Compiling all the state regulations into a logical and coherent format required the creation of a new numbering system. The preface to the VAC clearly describes the new scheme and each volume contains a listing of the state agencies and their assigned VAC numbers. The conversion tables provided with the print product and the search capabilities of the CD-ROM allow those who worked with the "old" *Virginia Register* (VR) numbering system to easily find material within the new layout. The publisher has also established a toll-free hotline to assist with questions and provide insight into the latest amendments or adoptions of regulations.

The size and complexity of the project (over 20,000 pages contained within 22 volumes) caused significant delays in the initial publication. Consequently, this "newborn" Code is actually almost a year old. The database for the first edition includes all final regulations printed through Volume 11, Issue 15 (April 17, 1995) of the *Virginia Register*. Marine Resources Commission regulations are inclusive through Volume 11, Issue 22 (July 24, 1995) and the Department of Medical Assistance Services is current through Volume 11, Issue 17 (May 15, 1995).

The first cumulative supplement, consisting of all final regulations contained in the *Virginia Register* up to Volume 12 Issue 7 (December 25, 1995), is scheduled for distribution in April. Cumulative supplements are available twice yearly for the print version and CD-ROM consumers will choose between quarterly and semiannual supplements.

The *Virginia Register* remains the most effective way to track regulations in the time periods between the cumulative supplements. Issued every other week by the Virginia Code Commission, the *Virginia Register* allows users to trace the development of regulations,

including the substantive changes from the previous effective version as well as any changes occurring from the proposed to the final version of the regulation. Notice requirements of the Administrative Process Act (§9.6.14:1 et seq. of the Code of Virginia), including the summary, basis, and impact statements and the economic impact analysis and agency response are also printed in the *Virginia Register*. With the arrival of the VAC, the *Virginia Register* will no longer print the full text of an amended regulation. Only the text of the section being altered will appear in the *Virginia Register*.

Another useful resource to use in conjunction with the VAC is the Administrative Law Appendix. Lawyers Cooperative Publishing is also producing this soft bound compilation. Enclosed with each printed set of the VAC, this reference is an excellent starting point for any regulatory research. The Administrative Law Appendix contains a resume of each agency's responsibilities and the statutory authority that enables the agency to promulgate and enforce their regulations. Each copy contains a listing of each agency's operative regulations, along with regulatory forms and documents incorporated by reference. Individual copies of the Administrative Law Appendix are available from the publisher.

The VAC contains the full text of most agency regulations. However, to harness the rapidly growing size of the compilation, the Code Commission granted some exceptions. Subject areas regulated identically by the Commonwealth and the federal government do not receive full text coverage. However, these duplicate regulations do acquire a VAC number and are listed in chart format within the VAC. The end of each chapter contains a list of regulatory forms and documents incorporated by reference within the regulation. The Office of the Registrar can provide copies of these forms and documents.

The Virginia Administrative Code will provide greater accessibility to the regulations of the Commonwealth's agencies. Look for future articles in this newsletter providing timesaving tips for conducting research with the printed text and the CD-ROM product.

Once Again: What's Fact, What's Law, and Who Decides

by John Paul Jones

J. W. Burress, Inc. v. Department of Motor Vehicles, decided by the Circuit Court for the Twenty-Third Circuit (Roanoke) in January, will soon appear in Volume 37 of Hamilton Bryson's **Circuit Court Opinions**. It involves judicial review of a decision by the Commissioner of Motor Vehicles pursuant to Article 7 of the Virginia Motor Vehicle Dealers Act, Va. Code § 46.1-1500 et seq. The facts are as follows.

With dealerships in Roanoke, Norfolk, and Gainesville, Burress sold street sweepers and their parts for the Elgin Sweeper Company. By a 1993 contract, Elgin designated for Burress an "area of primary sales responsibility" that included all of Virginia and part of North Carolina. In 1994, Elgin informed Burress that Elgin was establishing another dealership, in Richmond. Burress objected, applying to the Commissioner for a hearing under Article 7 of the Dealers Act, which authorizes the Commissioner, at the behest of an existing franchised dealer, to review new franchises in "the relevant market area," and to require reasonable evidence that the market will support all the dealers of that line of motor vehicles in the area. In this case, a hearing officer determined Burress's "relevant market area" to be the area of primary sales responsibility agreed upon by Burress and Elgin in their contract, i.e., all of Virginia. The hearing officer also reported that the record contained no evidence to support a finding that Virginia could support two Elgin Sweeper dealers. Afterwards, the Commissioner declined to adopt the hearing officer's choice of a market area, ruling instead that, because Burress's dealership was located in Roanoke, and because the statute defined relevant market area as within a radius of fifteen miles of the existing dealership, a Richmond dealership would not be located in Burress's relevant market area. Since, according to the Act, the new dealership would not encroach, Burress was not entitled to a hearing under the Act. Burress appealed to the circuit court.

At the time, the Dealers Act offered three different definitions of "relevant market area" for use in adjudicating disputes between dealers and franchising manufacturers. The definitions varied according to the density of population around the site of the complaining dealership. For disputes triggered by an attempt on the part of a manufacturer to put another dealership in the area, the Act defined relevant market area using a ten-mile radius in localities with populations of 250,000 or more, a fifteen-mile radius in localities with populations between 150,000 and 250,000, and either a twenty-mile radius or "the area of responsibility defined in the franchise," whichever is greater, elsewhere. (For any other dispute covered by the Act, the relevant market areas was, regardless of the locality's population, either a twenty-mile radius or the area of responsibility defined in the franchise.)

The circuit court vacated and remanded, finding that the Commissioner's decision that Burress was not entitled to a hearing by the Commissioner was not supported by substantial evidence. According to the court, the record was devoid of any evidence at all to support the conclusion that Burress's dealership was located only in Roanoke, especially when Elgin Sweeper had conceded before the court that Burress had dealerships in Norfolk, Gainesville, and Roanoke. Treating the Commissioner's decision that Burress's market area was centered in Roanoke as a finding of fact reviewed by reference to a substantial evidence standard, the court had no trouble setting it aside.

In court, both sides agreed that Burress had dealerships in three locations: Roanoke, Norfolk, and Gainesville, and Elgin conceded that the record before the Commissioner proved as much. The court's opinion is therefore disingenuous at best in stating that the record before the Commissioner contained no support for the Commissioner's factual determination that Burress's dealership is in Roanoke. The record indeed supported a finding that Burress deals in Roanoke; the real problem was that the record also proved Burress deals at two other locations as well. What therefore had to be considered by the Commissioner (and, later, the court) was how proof of three dealing locations could sustain a decision to treat Burress's relevant market area as related only to one. This is not an issue of fact, Norfolk, Virginia 235 a mixed question of law and fact, but a question solely of law: how § 46.1-1500 applies to any dealership operating in more than one location.

When the court's opinion re-characterized the fatal failure in the Commissioner's record as the absence of any evidence to support the proposition that Burress sold Elgin products *only* from one location, the opinion implied such a condition is to be found in the statute. To the contrary, such a condition is not explicitly set forth in The Dealers Act. Indeed, § 46.1-1500 opens with the proviso that the specific decisions which follow apply "[unless the context otherwise requires." Whether the condition that, for one dealership, several sites must be treated separately, should be found in § 46.1-1500 by implication is another matter, leading inexorably to the tricky question of who gets to decide what the General Assembly would have wanted, i.e., what should be implied. Here, faced with a situation not explicitly addressed in the Act, the circuit court expressed no reservations about substituting its own view of what a relevant market area ought to be for that of the Commissioner, notwithstanding the general intention of the General Assembly, made clear in the very existence of the Act, that disputes of this sort are better handled by the Commissioner than by the courts.

The Dealers Act has since been substantially amended, but it still offers three alternatives for defining the relevant market area when a dealer and his or her franchising manufacturer clash: a territory defined in the franchise agreement, a circle with a radius varying according to population density, or something else altogether, when "the context otherwise requires. The Act still dictates how to choose between the territory described in the franchise and the circle --whichever produces the larger area. However, the Act still does not say when the context otherwise requires, so that neither applies. More importantly, in the absence of any criterion, the Act is still silent as to who gets to decide.

Attention Web Surfing Admin Lawyers!

The American Bar Association's Administrative and Regulatory Law Section has made itself at home on the World Wide Web. Its home page has two addresses. To receive both text and graphics, use:

<http://grover.abanet.org/adminlaw/home.html>

To receive only text, use:

<http://www.abanet.org/textonly/adminlaw/home/html>

LEX MUNDI, a worldwide organization of independent law firms which have formed an association for the professional exchange of information has a home on the World Wide Web, entitled Hieros Gamos. It has a submenu of useful national and supranational sources for administrative law, a worldwide directory, and links to various search engines and depositories. The address is:

<http://www.hg.org>

The *Code of Federal Regulations* and the *Federal Register* are both available on the Web, through the **House of Representatives Internet Law Library**. The address is:

<http://www.pls.com:8001>

Virginia's homepage offers Internet access to, among other things, the text and status of bills in the General Assembly, JLARC Reports, and various information posted by state agencies, including telephone directories and calendars. The address is:

<http://www.state.va.us>

More to come....

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MEMBERSHIP APPLICATION
THE ADMINISTRATIVE LAW SECTION

Please aid your Section in its membership drive by forwarding this application to your colleagues.
I desire membership in the Administrative Law Section of the Virginia State Bar.

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Enclose a check payable to VSB for annual dues in the amount of \$15.00. Mail to: Virginia State Bar
Administrative Law Section, Eighth and Main Building, 707 East Main Street, Suite 1500, Richmond, VA 23219-0500

1996 VIRGINIA ADMINISTRATIVE LAW CONFERENCE

COMMUNICATION BETWEEN AGENCY DECISION MAKERS AND ADVOCATES

MAY 21, 1996

RICHMOND MARRIOTT HOTEL

Modeled on the "bench-bar" conference, this program will feature agency representatives discussing case decisions and related procedures from the perspective of the decision-maker and attorneys who practice before state agencies offering their perspective and suggestions. The format is intended to foster greater understanding, and to spur wider discussion about effective communications, on both sides of the bench.

12:30 p.m. - 1:00 p.m. REGISTRATION

1:10 p.m. - 1:25 p.m. KEYNOTE ADDRESS

The Administrative Adjudication Process: Differing Communication Requirements of Collective (Agency) Decision-making and Solitary (Judicial) Decision-making

Speaker: The Honorable Elizabeth B. Lacy, Justice, Supreme Court of Virginia.

1:30 p.m. - 2:45 p.m. PANEL DISCUSSION: AGENCY DECISION MAKERS

Moderator: M. Coleman Walsh, Jr., *Chief Administrative Law Judge, Virginia Employment Commission*

Panelists: Michael Oglesby, *Department of Alcoholic Beverage Control*
Robert G. Burnley, *Department of Environmental Quality*
John J. Beall, Jr., Esquire, *Office of the Attorney General*
Anthony J. Gambardella, Jr., *State Corporation Commission*

3:00 p.m. - 4:15 p.m. PANEL DISCUSSION: Advocates Who Practice Before Administrative Agencies

Moderator: Kevin J. Finto, Esquire, *Hunton & Williams*

Panelists: Robert J. Grey, Jr., Esquire, *LeClair Ryan, P. C.*
Timothy G. Hayes, Esquire, *Williams, Mullen, Christian & Dobbins*
Louis R. Monacell, Esquire, *Christian & Barton*
David F. Peters, Esquire, *Hunton & Williams*

4:15 p.m. - 5:00 p.m. QUESTION AND ANSWER AND WRAP-UP SESSION

5:00 p.m. - 6:00 p.m. RECEPTION (Courtesy of Lawyers Cooperative Publishing)

Registration Fees: \$60.00 for state & non-profit employees, \$75.00 for all others.

Approved by the Virginia Mandatory Legal Education Board for three and a half hours of credit.

For further details: Contact Brenda Dillard at the Virginia Bar Association: (804) 644-0041 or

FAX: (804) 644-0052

THE FOURTEENTH NATIONAL REGULATORY CONFERENCE
BEYOND RATEMAKING:
ALTERNATIVES TO RATE OF RETURN REGULATION
Sunday, May 5, 1996

5:30-7:30 p.m. COMMISSIONERS' RECEPTION

Williamsburg Hospitality House

Everyone attending the conference is cordially invited to this reception on Sunday evening. Come meet the Commissioners, as well as the panelists and speakers on the conference program.

Monday, May 6, 1996

8:00 a.m. REGISTRATION and CONTINENTAL BREAKFAST *Marshall-Wythe School of Law*

8:45 a.m. WELCOME

9:00 a.m. KEYNOTE SPEAKER: **Dr. Charles G. Stalon**, Consultant on Energy Regulation
Quasi-Judicial Agencies Regulating Rivalrous Utilities: An Oxymoron?

9:45 a.m. A Debate: **IS RATE OF RETURN REGULATION STILL VIABLE?**

Traditionally, ratemaking has been almost synonymous with rate-of-return regulation. Increasingly, however, utilities, consumers, regulators and state legislators are considering alternative regulatory structures, including incentive regulation, competitive bidding, price caps and performance based ratemaking.

Moderator: **Ashley C. Brown**, Verner, Lüpfer, Bernhard, McPherson & Hand

Traditional Ratemaking Advocate: **Joseph F. Brennan**, Chairman, AUS Consultants

Alternative Ratemaking Advocate: **Jerry Pfeffer**, Energy Industries Advisor,
Skadden, Arps, Slate, Meagher & Flom

11:15 a.m. Panel: **ALTERNATIVES TO TRADITIONAL RATEMAKING**

What are the alternatives to traditional ratemaking? What is being done now, and what is on the drawing board?

Moderator: **Louis R. Monacell**, Christian & Barton

Panelists: **J. Mack Wathen**, Manager of Pricing (Electricity and Natural Gas)
Delmarva Power & Light Company
Peter Navarro, Associate Professor of Economics and Public Policy
Graduate School of Management, University of California
Ronald J. Binz, Public Policy Consulting

12:15 p.m. LUNCHEON

The Cascades Restaurant

Speaker: **The Honorable Clinton Miller**, Virginia State Corporation Commission Virginia's
newest Commissioner will offer his thoughts on the future -- his and ours.

2:00 p.m. Panel: **THE TELECOMMUNICATIONS EXPERIENCE**

What can we learn from the experience of the telecommunications industry? Key players in the will discuss the effective (and not so effective) pricing alternatives which they have experienced over the past decade.

Moderator: **Thomas G. Krattenmaker**, Dean, Marshall-Wythe School of Law

Panelists: **William Irby**, Manager - Rates & Costs
Virginia State Corporation Commission
Wilma R. McCarey, General Attorney and Government Affairs Vice President
AT&T Corporation
J.G. Harrington, Dow, Lohnes & Albertson
Dwight W. Allen, Vice President - Regulatory Affairs & General Counsel
Sprint Mid-Atlantic Telecom Inc

3:15 p.m. Perspective: **EXPERIENCE IN THE UNITED KINGDOM AND EUROPEAN COMMUNITY**

What can we learn from the United Kingdom's experience with alternative forms of regulation for the electricity industry? What is the status of electric regulation in the European Community? The energy manager of a multinational industrial company will provide his views on progress and pitfalls experienced on the other side of the Atlantic

Introduction: **The Honorable Hullahen Williams Moore**, Virginia State Corporation Commission

Speaker: **Kenneth J. Green**, Commercial Manager -- Energy
Energy Policy and Purchasing Department
ICI Chemicals & Polymers Limited

4:15 p.m. Panel: **RATEMAKING AND OTHER CURRENT RESTRUCTURING ISSUES**

While the conference has focused on one very specific aspect of the current restructuring of the energy marketplace, this final panel will address the impact that ratemaking can have on the total picture. How will developments in ratemaking affect restructuring, deregulation and competition? What are the relationships between alternatives to traditional regulation and the proposed changes in PUHCA, PURPA, access (wholesale and retail), etc?

Moderator: **Edward L. Petrini**, Office of Virginia Attorney General

Panelists: **Dr. Johannes M. Bauer**, Director
The Institute for Public Utilities, Michigan State University
The Honorable John Hanger, Pennsylvania Public Utility Commission
Dr. John Jurewitz, Southern California Edison
Billy Jack Gregg, West Virginia Office of Consumer Counsel

Approved by the Virginia Mandatory Legal Education Board for six hours of credit.

Registration Fees: \$185.00 per person, \$170.00 for VSB Administrative Law Section Members.

For further details: Contact Mary Council at the State Corporation Commission. TEL: (804) 371-9141 or FAX: (804) 371-9211.



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