

Administrative Law News

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SPRING 2002

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The 20th Anniversary of the NRC

by the Hon. Alexander F. Skirpan, Jr.

2002 is the 20th anniversary of the National Regulatory Conference, which has come to serve as the de facto annual meeting of SCC regulated industries and the bar that practices before the SCC. 2002 also marks the State Corporation Commission's 100th year of service to the Commonwealth. To commemorate these significant milestones, the theme of this year's NRC is "Back to the Future, Where Do We Go From Here?" The traditional Commissioner's reception on Monday night will also serve as the 20th National Regulatory Conference reunion. All conference attendees are invited to this reception, as are participants from the nineteen previous conferences.

This year's NRC Committee, which consists of Jim Guy, Brian Buniva, Howard Anderson, Pat Horne, Borden Ellis, Alex Skirpan, John Holloway, John Dudley, Bob Gillespie, and Harry Glover, has worked hard to provide a program that will provide an historical perspective, an assessment of current events, and a glimpse of what the future may hold.

Professor Dan Roberts, known for his syndicated radio program, A Moment In

Time, will provide the historical perspective with his keynote address on America's love/hate relationship with regulation.

Three panels will assess current events by exploring new developments and emerging issues in the energy and telecommunications industries. The first panel tackles one of the most hotly contested subjects in energy regulation: regional transmission organizations ("RTOs"). This panel of experts explores standard RTO market design, locational marginal pricing, responsibility for transmission placement and construction, and terms and conditions of generation. The second panel considers what to do if competition breaks out, notwithstanding the Telecommunications Act of 1996. The third panel analyzes lessons learned from Enron and the impact Enron will have on the energy industry. This panel examines federal legislative and regulatory initiatives driven by Enron and discusses the impact of Enron on energy project developments.

A panel of industry leaders and leading academics will provide a glimpse of what the future may hold, including changes likely to occur in technology and business practices,

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Alex Skirpan serves as Secretary of the Administrative Law Section Board of Governors. He is a Hearing Examiner for the Virginia State Corporation Commission.

Surf, Sand and CLEs

Brian Buniva, our Section's secretary, is organizing this year's CLE panel for the VSB's annual meeting. As always, the panel will provide a great opportunity to get involved in bar activities, meet your colleagues, and earn CLE credits while enjoying the gentle breezes of Virginia Beach in June.

The program is "Administrative Law Update: Environmental Directions for Virginia in 2002 and Beyond" and will be held at 8:30 a.m. on June 14th. This year's program is breaking new ground because it is being co-sponsored

with the Environmental Law Section. The details are still being worked out, but so far the panelists include Tayloe Murphy, who is Secretary of Natural Resources, John R. Butcher, who has served as Senior Assistant Attorney General, and William T. Bolling, the 4th District Republican senator representing Hanover.

Registration materials for the VSB annual meeting will be mailed in April and are also available on the VSB website, www.vsb.org. ■

Surfing the Net

Convergent Technologies and High-Speed Internet Regulation

by Richard W. Gregory and T. Borden Ellis

Editor's note: As this article goes to the printers, reports in the trade press document the controversy raised by the FCC's March 15th ruling. Ted Hearn's April 3rd article for Multichannel News, titled "Abernathy Affirms Support for Access Parity," reports that the FCC is studying whether to (a) retain the status quo (where phone companies must comply with open access rules but cable operators do not have to comply), (b) apply access rules to both industries, or (c) allow both to compete without access requirements. Hearn notes that FCC commissioner Kathleen Abernathy may side with applying access requirements to both telephone companies and cable companies, which would create a deadlock on the FCC, with Abernathy and commissioner Michael Copps supporting open access requirements for cable operators, and with FCC chairman Michael Powell and commissioner Kevin Martin opposing open access requirements for cable operators. The tie would not be broken until the 5th seat on the FCC is filled by President Bush and the Senate; a vote on Bush's nominee is currently being blocked by Senate Minority Leader Trent Lott.

The struggle over how to regulate high-speed Internet access has reached almost mythic proportions. As the Ninth Circuit put it, "Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal landscape, and charge a course by the law's words." *AT&T Corp. City of Portland*, 216 F.3d 871, 876. Charging a course by the law's words has proven especially challenging with high-speed Internet access because the Telecommunications Act of

1996 has forced regulators and courts to navigate the uncertain waters of classifying convergent technologies, in which technological advancements allow two or more differing technological mechanisms to provide similar services. Decisions within the past two months by the United States Supreme Court and by the Federal Communications Commission ("FCC") suggest that the FCC has taken over the helm of the ship and has full responsibility for navigating the regulatory course for high speed Internet access. The Supreme Court, when deferring to the FCC's expertise for regulating cable modem service in its *Gulf Power* decision, noted that "the subject matter here is technical, complex, and dynamic; and, as a general rule, agencies have authority to fill gaps where statutes are silent." *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 122 S. Ct. 782 (2002) at 783-784. The course charted by the FCC, which categorizes high-speed Internet access as an "interstate information service," will have significant implications for local governments, cable operators, telecommunications providers, internet service providers, and residential consumers of high speed Internet access services. The remainder of this article will explore the road map laid out by the FCC in its groundbreaking March 15, 2002 Declaratory Ruling and Notice of Rulemaking, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking (rel. March 15, 2002) ("*Cable Internet Inquiry*").

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The SCC'S Counsel To The Commission: Identifying Their New Role

by Philip R. "Duke" de Haas

The State Corporation Commission ("Commission" or "SCC") announced significant restructuring of its internal operations and procedures effective February 1, 2002.¹ The SCC's changes were a response to the changing business and regulatory environment, including the advent of more competitive approaches to the industries subject to SCC regulation.

The changes are designed to address, in part, some of the recommendations made following an internal study of the Commission's operations and practices,² and additional suggestions by external actors, including the regulated community and the General Assembly.³

One important aspect of the internal restructuring was the creation of two new positions, Counsel to the Commission—Utilities and Counsel to the Commission—Business and Financial ("Counsel").⁴ The two positions will provide, when necessary, a buffer between the Commission and the Commission staff ("Staff").

As the titles suggest, the two counsel positions will primarily focus on certain areas of SCC responsibility.⁵ However, it is anticipated that the two Counsel will collaborate closely on many issues. The Counsel⁶ will primarily be providing advice and guidance to the Commissioners, rather than to Staff.⁷

There are at least four potential areas in which the Counsel will be actively engaged: pending formal proceedings, informal proceedings, external matters, and internal matters.⁸

Pending Formal Proceedings

The Counsel will play an important role with regard to "pending formal proceedings."⁹ Rule 60 of the SCC Rules, 5 VAC 5-20-60, provides, in pertinent part, that:

[n]o facts nor legal arguments likely to influence a pending formal proceeding and not of record in that proceeding shall be furnished ex parte to any commissioner or hearing examiner by any member of the commission staff.

The Counsel may be called upon to attend hearings in major cases before the Commission, provide advice to the Commissioners about the case, and oversee the preparation of final orders disposing of certain matters. This should minimize any misperception that

Philip R. "Duke" de Haas serves as Counsel to the Commission—Business and Financial.

Staff has had additional "bites at the apple."

Informal Proceedings

The Commission is often asked to act informally on matters that are in dispute before one of the Divisions but that have not been established as a formal proceeding. For example, Rule 70 of the SCC Rules, 5 VAC 5-20-70, provides that:

All correspondence and informal complaints shall be referred to the appropriate division or bureau of the Commission. The head of the division or bureau receiving this correspondence or complaint shall attempt to resolve the matter presented. Matters not resolved to the satisfaction of all participating parties by the informal process may be reviewed by the full commission upon the proper filing of a formal proceeding in accordance with the rules by any party to the informal process.

While many of these matters are handled at the Division level, the resolution of matters at the staff level is not binding on the Commission.¹⁰ Usually, "informal complaints" involve only the complaining party and the Division head. However, there are situations in which multiple parties may be interested, or the matter may impact the public in ways not contemplated by the party bringing



1. On June 1, 2001, the SCC's new Rules of Practice and Procedure, 5 VAC 5-20-10 et seq., ("SCC Rules") became effective.

2. One component of this internal study was the Wirick Report. See Dave Wirick and John Wilhelm, Final Report on the Virginia State Corporation Commission, March 2001.

3. See, e.g., S.C.C. Case No. CLK000311, Ex Parte: In the matter concerning revised State Corporation Commission Rules of Practice and Procedure, Final Order (April 30, 2001) and comments submitted as part of that proceeding; and the website of the Joint Subcommittee Studying the Regulatory Responsibilities, Policies and Activities of the State Corporation Commission, <http://dls.state.va.us/sccestudy.htm>.

4. The author became Counsel to the Commission on July 1, 2000. The restructuring and additional position, however, significantly changes the role of the office of the Counsel to the Commission.

5. The Counsel to the Commission-Utilities will primarily focus on electricity, gas, water, telecommunications, and railroad regulation, while the Counsel to the Commission-Business and Financial will primarily concentrate on insurance, financial institutions, securities and retail franchising, and corporate/clerk's office matters. For ease of reference, both positions will be referred to as "Counsel" in this article.

6. The current Counsel to the Commission-Utilities is John F. Dudley, and the current Counsel to the Commission-Business and Financial is Philip R. "Duke" de Haas.

7. The Office of General Counsel ("OGC") will continue to provide advice and counsel to the Commission's Divisions. OGC will also continue to advocate for Staff in formal proceedings before the Commission. The new structure does not minimize the role of OGC.

8. The new structure should be considered a work in progress, and the roles of the Counsel will continue to evolve as the new structure confronts real-life situations.

9. What constitutes a "pending formal proceeding" also will evolve over time in all likelihood. A case that has a formal case number, that is scheduled for hearing, and that has had testimony pre-filed would definitely qualify. A matter in which a Rule to Show Cause has been issued against a Defendant would also be deemed a "pending formal proceeding." Defining a "pending formal proceeding" is beyond the scope of this article. The examples given are meant to be illustrative, rather than exhaustive.

10. See *Roanoke Gas Co. v. Division of Consumer Counsel*, 219 Va. 1072, 1079, 254 S.E.2d 102, 106 (1979) (Commission employees merely assist the Commission in the discharge of its duties and Commission staff recommendations cannot bind the Commission).

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SCC Declines to Enforce Arbitration Provisions

by Michael J. Quinan

Contracts involving matters subject to regulation by the State Corporation Commission ("SCC"), such as contracts for energy services, often contain arbitration provisions that are intended to allow the parties to avoid litigation by having the SCC arbitrate the dispute. A recent decision by the SCC suggests that such arbitration provisions may not be enforceable, as a practical matter, unless all parties to the contract agree, *at the time the dispute arises*, to submit the dispute to the SCC for arbitration.

International Paper Company and Dominion Virginia Power are currently litigating a dispute involving the terms of a Power Purchase Agreement under which Dominion purchases electricity produced by the co-generation facilities located at International Paper's mill in Franklin, Virginia. In fact, Dominion claims that the Agreement is terminated. Whether the Agreement is terminated, and whether it has been breached by one or the other party, will be determined by the United States District Court for the Eastern District of Virginia in Norfolk, after a trial that is scheduled to begin on May 1, 2002.

International Paper attempted to arbitrate the matter at the State Corporation Commission, and sought dismissal or stay of the federal court proceedings until the Commission arbitration was completed. The District Court denied the motion to dismiss or stay and thereafter the Commission dismissed the petition for arbitration. By its Order of February 19, 2002, the Commission rejected all three statutory grounds offered by the petitioner for the Commission's jurisdiction to arbitrate. *Petition of International Paper*, S.C.C. Case No. PUE010533, Order Granting Motion to Dismiss (Feb. 19, 2002).

First, International Paper asserted that jurisdiction was provided by Va. Code § 56-35, which charges the Commission with the duty to supervise, regulate and control public service companies doing business in the Commonwealth in all matters relating to their public duties, and to correct abuses by such companies. The dispute between the parties had manifested itself in the bills submitted

by Dominion, and International Paper claimed that this gave the Commission authority to arbitrate because a utility's billing practices are part of its "public duties." The Commission, however, was not persuaded, and held that the case involved "a classic contractual dispute arising under a contract executed solely between the two parties," and that International Paper's allegations did not contain the type of abuse contemplated by the statute.

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VIRGINIA STATE BAR ADMINISTRATIVE LAW SECTION

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Mike Quinan is a principal in the Richmond office of Woods, Rogers & Hazlegrove, P.L.C. He is representing International Paper in this matter.

Assessing Environmental Impact of New Power Plants

by John Malcolm Holloway III

This year's General Assembly session again included a legislative tweak to Virginia's retail electricity competition initiative. S.B. 554, sponsored by Senator Tommy Norment (R - 3rd Dist.) and the Legislative Transition Task Force, which Senator Norment chairs, addressed the overlap in the current facility siting process between the State Corporation Commission's (Commission) authority and the authority of local, state and federal permitting agencies. This overlap has been most evident in the Commission's consideration of the potential environmental impacts of proposed merchant electric generating facilities. As many as 30 proposed merchant power plants have been announced in Virginia, although most observers agree that in the wake of Enron, the actual number of plants that will be built is a small fraction of this number.

The Commission first signaled its interest in taking a more active role on merchant plant environmental impacts on December 14, 2001, when it adopted new rules for applications to construct and operate electric generating facilities and provided notice of additional proposed rules that would require applicants to identify the cumulative impacts of the applicant's proposed facility and other proposed facilities on existing overall air quality in any area and on existing water resources in the area. *Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities*, S.C.C. Case No. PUE010665, Order Adopting Rules and Prescribing Notice (December 14, 2001) (the "Rules Proceeding"). Applicants also must provide information assessing the impacts of the applicant's facility in conjunction with other proposed electric generating facilities and manufacturing facilities on Virginia natural gas and fuel oil infrastructure and availability of fuel supplies, as well as a discussion of how the proposed facility will impact the applicant's ability to exert market power within the facility's control area. Next, in a January 16, 2002 order, the Commission remanded the application of

Tenaska Virginia Partners, L.P. to further develop the record on the issues of cumulative environmental impacts; impacts on natural gas resources and other gas and water utilities; impacts on economic development if there is deterioration in air quality in Fluvanna County and surrounding counties; and whether the facility's use of ultra low sulfur fuel oil backup for up to 720 hours between the months of October and March each year is in the public interest given potential traffic and environmental concerns. *Application of Tenaska Virginia Partners, L.P. for approval of a certificate of public convenience and necessity pursuant to Virginia Code § 56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work*, S.C.C. Case No. PUE010039, Order (January 16, 2002) (the "Tenaska Proceeding").

The Commission issued its order in the Tenaska Proceeding in spite of the fact that the facility in question had received an air pollution permit from the Virginia Department of Environmental Quality (DEQ), as well as necessary water withdrawal permits, at the time that the Commission issued the order. The DEQ also participated in the hearing for the Tenaska Proceeding and filed a letter in the record disagreeing with the Hearing Examiner's recommendation that the DEQ require all "major pollution sources" to conduct cumulative impact modeling on the basis that his concerns were already addressed in Virginia's air permitting process.

S.B. 554 addresses this overlap by revising Va. Code §§ 56-46.1, 56-580.d. and 10.1-1186.2. With respect to § 56-46.1, S.B. 554 adds language which states that

to avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and

Jay Holloway is an associate at the Richmond office of Hunton & Williams. He represents a number of merchant plants, including Tenaska Virginia Partners, L.P., that have filed applications with the State Corporation Commission to construct and operate electric generating facilities.

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Brown Bag Luncheon Program

Virginia's Administrative Agencies: Practice Tips that Win
by Cliona Mary Robb

On March 28th, a standing-room only crowd was treated to another high-quality, timely, and affordable educational program sponsored by the VSB Administrative Law Section. Our Section's secretary Alex Skirpan, who also serves as Treasurer of the Virginia Association of Administrative Law Judges & Hearing Examiners, used his connections to round up an outstanding and diverse group of administrative law judges to give Section members the inside scoop on what to do and what not to do when representing clients before their agencies. Kodwo Ghartey-Tagoe, the Immediate Past Chair of our Section, moderated a lively panel discussion.

The panel featured

- Michael Oglesby, *Chief Hearing Officer for the Alcoholic Beverage Control Board*
- Steven Taylor, *Hearing Officer for the Department of Motor Vehicles*
- Michael D. Thomas, *Hearing Examiner for the State Corporation Commission*
- John Moody, *Chief Hearing Officer for the Dept. of Social Services*
- Dean Ricks, *Examiner for the Virginia Employment Commission*

ABC Board

Mike Oglesby provided a summary of the Rules of Practice for the ABC Board in Q&A format along with the Rules of Practice, Central Office and Regional Office contact information, and sample notices. He noted that the ABC Board's administrative hearings are generally of two types: (1) Applications - to obtain an ABC license, and (2) Disciplinary - to determine whether a licensee has violated one or more ABC laws and regulations. Mr. Oglesby stressed the value of counsel consulting with his agency on procedural issues to avoid misunderstandings in litigation. He also recommended that attorneys consider making a FOIA

Cliona Robb serves as Newsletter Editor for the Administrative Law Section Board of Governors. She is a partner at Christian & Barton, L.L.P., where her practice primarily focuses on SCC-regulated industries. As Newsletter Editor, she encourages attorneys who practice before other administrative agencies to submit articles of interest to them for publication in Administrative Law News.

request to obtain information in the agency's possession.

Department of Motor Vehicles

Steve Taylor described the types of cases before a hearing officer at the DMV, some new DMV practices and procedures, and practice tips for attorneys representing clients before the DMV. He noted that hearings before the DMV are primarily enforcement in nature and cautioned that one of the most important practice tips in that area is for counsel to let the agency know if they would not attend a hearing. Mr. Taylor also suggested that if attorneys had any difficulty getting materials from DMV, then they should consider submitting a FOIA request.

State Corporation Commission

Mike Thomas noted that a vast majority of cases handled by the State Corporation Commission settled at the staff level, so it is important for attorneys working on SCC matters to get to know the SCC staff well.

Mr. Thomas recommended that those involved in SCC hearings should take notes on the testimony of public witnesses so that issues raised by public witnesses could be addressed with direct or rebuttal evidence of a party's own expert witness. Mr. Thomas also suggested that tortuous cross-examination of an unwilling expert witness was not a good strategy. It is better for a party to get its expert witness to explain why the other party's expert witness is wrong.

Mr. Thomas advised that when a party asks a hearing examiner to certify an issue for immediate review by the Commissioners, the party should make sure that the issue was material to its case or else the issue will not be certified. When someone asked whether a discovery dispute could be certified for review, Alex Skirpan, who also serves as an SCC Hearing Examiner, said that the rule of thumb is whether the dispute was something the case would turn on, i.e. is it determinative of the final result? Mr. Skirpan thought that a discovery dispute would rarely be certified. One such instance might occur when a Hearing Examiner rules that an applicant must produce the evidence, and the applicant indicates that it will withdraw its case rather than have the discovery compelled.

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Springtime in Williamsburg *(continued from page 1)*

as well as laws and regulations that may help or hinder future industry development.

The NRC will close with one of its most popular features: the panel providing two hours of ethics CLE credit. Attorney General Jerry Kilgore moderates this year's ethics panel, which addresses issues related to providing legal advice on business strategy and risk

analysis, as well as issues concerned with representing corporations and advising employees of that corporation.

A special feature this year is a demonstration of the Commission's new case management system, which is expected to be assessable via the Internet by the end of May. ■

Surfing the Net *(continued from page 2)*

Description of High-Speed Internet Access

Approximately 50% of U.S. households have Internet connections, with the vast majority of these subscribing to Internet access offered through dial-up connections over traditional telephone lines ("dial-up access"). Dial-up access is considerably slower than high-speed Internet access, as dramatized in a recent cable company ad that describes dial-up access as being as outmoded as eight track tapes and Betamax. High-speed Internet access "enables consumers to communicate over the Internet at speeds that are many times faster than the speeds offered through dial-up telephone connections . . . and . . . enables subscribers to send and view content with little or no transmission delay, utilize sophisticated 'real-time' applications, and take advantage of other high-bandwidth services." *Cable Internet Inquiry* at 2, note 2.

Residential high-speed Internet access can be offered over a variety of electronic platforms: wireline, cable, terrestrial wireless, and satellite. *Id.* at 5, ¶ 6. Wireline represents about 29% of the high-speed Internet access market and is offered by local phone companies over copper wires in the form of digital subscriber line ("DSL") service. Cable represents about 68% of the market and is offered by cable operators over coaxial cable lines in the form of cable modem service. Terrestrial wireless and satellite represent about 3% of the market and are provided over terrestrial wireless radio spectrum by mobile and fixed wireless providers and over satellite radio spectrum by satellite providers. *Id.* at 6, ¶ 9. The Cable Internet Inquiry focuses on cable modem service and, to a lesser extent, DSL services. It does not address terrestrial wireless or satellite platforms used to provide residential high-speed Internet access services. *Id.* at 3, note 5.

DSL Services and Cable-Modem Services

Because convergent technology permits local phone companies and cable operators to offer high-speed Internet access that utilize differing technologies, these traditionally separate industries find themselves to be competitors. The ground rules for this competi-

tion are dictated by the Communications Act of 1934, as amended by the Telecommunications Act of 1996, codified at 47 U.S.C. §151 et seq. (hereinafter "Communications Act"), which subjects local phone companies to Title II regulation as common carriers and which subjects cable operators to a dual system of regulation under Title VI involving both the FCC and local franchising authorities. (In Virginia, local franchising authorities are cities, counties, and towns.) With such regulatory disparity, much can depend upon how a certain service is categorized. Since the Communications Act does not explicitly define Internet services, litigation has risen as to which regularity scheme, high-speed cable modem Internet services belong, and Virginia's federal courts have been in the thick of the controversy to define cable modem services. Only after varying categorization by the courts has the FCC in its Cable Internet Inquiry declared its categorization of cable modem services.

When categorizing cable modem services, the FCC sought to create, for both DSL service and cable modem service, "a rational framework for the regulation of competing services that are provided over different technologies and network architectures." *Id.* at 5, ¶ 6. The FCC also strove "to develop an analytical approach that is, to the extent possible, consistent across multiple platforms." *Id.*

Open Access Requirements

One crucial issue to be resolved by the FCC is whether cable operators and local phone companies must provide unaffiliated Internet service providers with open access to their high-speed Internet access facilities. Under a standard Title II regulatory scheme, the answer would be "yes" (i.e. traditional phone lines are subject to common carrier, open access requirements). Under a standard Title VI regulatory scheme, the answer would be "no" (i.e. traditional cable lines are not subject to common carrier, open access requirements). When applying these standard regulatory schemes, if DSL services are considered telecommunications services and cable modem services are considered cable services, then local phone companies would be forced to give unaffiliated ISPs access

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Surfing the Net (continued)

to the phone companies' facilities so the unaffiliated ISPs could directly service DSL service customers, while cable operators would not have to provide ISPs with the right to access cable modem customers directly. This means that high-speed Internet services would be subject to vastly different regulatory requirements, depending upon whether a local phone company or a cable operators was offering the service.

The Cable Internet Inquiry indicates that the FCC intends to resolve this dilemma by declaring that neither Title II nor Title VI will apply because high-speed Internet access services will be classified as "interstate information services" subject to Title I regulation, regardless of whether such services are offered as cable modem services or DSL services. *Id.* at 35, 45, ¶¶ 59, 77. This approach would give the FCC enough flexibility to make consistent rules for both DSL services and cable modem services, but this approach does not determine what those rules will be because the FCC's authority under Title I is somewhat open-ended. Accordingly, the FCC seeks comment in both its Cable Inquiry Docket and its DSL docket as to whether it should require multiple ISP access for either DSL services or cable modem services. *Id.* at 42, 45, ¶¶ 72, 77; see *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking (rel. Feb. 15, 2002).

Local Franchising Authorities

Classification of cable modem service as an interstate information service has other significant implications as well. The FCC's classification undermines the authority of local franchising authorities to regulate cable modem services. Local franchising authorities have argued that this authority would encompass the imposition of multiple ISP access requirements, additional franchise obligations, typical franchise fees, and customer service obligations. Although the Cable Internet Inquiry seeks comments on the role of local franchising authorities, the overall objectives of the FCC suggest that the FCC will determine that local franchising authorities have little or no authority to regulate cable modem services. The FCC's overall objective is "to remove regulatory uncertainty that may discourage investment and innovation in broadband services and facilities." *Cable Internet Inquiry* at 51, ¶ 97. The FCC is concerned that having "a patchwork of State and local regulations beyond matters of purely local concern" could result "in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries." *Id.* For instance, the struggle to determine the proper regulatory scheme for cable modem services has often occurred in the context of conditions imposed by local franchising authorities when approving the transfer of a franchise from one cable operator to another cable opera-

tor. Local franchising authorities have attempted to exercise their Title VI authority over review of cable franchise transfers by requiring the new operator to provide open access to the cable modem platforms. The Ninth Circuit rejected such an attempt by Portland, Oregon and Monmouth County because it held that the transport function of the cable modem service was a separate telecommunications service, which could not be required pursuant to cable franchising authority conferred pursuant to Title VI. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-880 (9th Cir. 2000). The Fourth Circuit rejected a similar attempt by Henrico County on the grounds that the access requirement compelling the cable operator to offer the platform separately for the use of unaffiliated ISPs impermissibly required the cable operator to provide telecommunications services. *Media One Group, Inc. v. County of Henrico*, 257 F.3d 356, 363-64 (4th Cir. 2001). A Florida federal district court overturned on First Amendment grounds a Broward County, Florida ordinance requiring cable operators to provide open access to impose access conditions. *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000). The Cable Internet Inquiry indicates that the FCC and not local authorities will determine whether cable operators are required to offer their cable platforms for the use of unaffiliated ISPs.

The Cable Internet Inquiry also tentatively concludes that Title VI franchising authority does not permit local franchising authorities to require cable operators providing cable modem service to obtain an additional franchise for using rights of way. *Cable Internet Inquiry* at 53, ¶ 102.

Franchise Fees

In perhaps the most decisive aspect of the Cable Internet Inquiry, the FCC clarified that cable modem services are not subject to franchise fees. Franchise agreements between cable operators and local franchising authorities typically require a cable operator to pay 5% of its gross revenues from cable service to the franchising authority as a franchise fee; this fee is passed through to the cable subscribers. Excluding cable modem fees from being included in the gross revenue subject to franchise fees is good news for cable modem subscribers, but it is bad news for local franchising authorities whose budgets may have counted on this revenue stream.

Franchise payments are currently being litigated in *Bova v. Cox Communication, Inc.* 2001 U.S. Dist. LEXIS 206090 (W.D. Va. 2001). Under various franchise agreements with local franchising authorities, Cox Cable and its affiliates provide cable Internet service to over 480,000 customers. A group of Cox Communications cable customers brought a class action against Cox Communications for the fees charged. The issue in *Bova* is essentially whether under the

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Surfing the Net *(continued)*

Communication Act it is lawful for Cox to charge franchise fees for Internet services.

The court noted that the issue would ultimately turn on whether the Internet service is classified as a cable service, a telecommunications service or an information service. *Id.* Plaintiffs argue the fee is unfounded because the service is a telecommunication service as found by the Ninth Circuit in Portland. *Id.* The court granted the plaintiffs' motion to certify the lawsuit as a class action. *Id.* In limiting the class to the Western District of Virginia, the court recognized the varying conclusions as to the classification of Internet services. The decision in this case has not yet been handed down.

The FCC recognized the far-reaching implications of its franchise fee determination when it cited *Bova* and suggested that the FCC may exercise jurisdiction over such franchise fee disputes. *Cable Internet Inquiry*

at 54-55, §§ 106-107. The FCC also noted that the complexity of classifying cable modem services means that, prior to issuing its Cable Internet Inquiry on March 15, 2002, both cable operators and local franchising authorities "believed in good faith that cable modem service was a 'cable service' for which franchise fees could be collected." *Id.* at 55, § 107.

It appears the debate over cable modem regulation is far from over. Cable modem services serves only as one example of challenges faced in regulating convergent technologies. As the cases examined demonstrate, courts and the FCC have wrestled with the proper classification of changing technology and new application of existing technology. With the leaps and bounds at which technology changes, courts are likely to be called upon even more frequently in the future to navigate the uncertain waters of classifying convergent technologies. ■

The SCC'S Counsel To The Commission: Identifying Their New Role *(continued from page 3)*

the complaint.

The Counsel will likely take an active role in meeting with participants in these situations and providing advice and counsel to the Commission on such matters. The Counsel are then able to keep the Commissioners informed of matters that may come before them without requiring them to take a position on such matters still being worked out at the Division level.

The Counsel will also be able to point out situations that may have arisen previously similar to the type of complaint at issue and can help ensure that the Division is aware of previous positions taken on such similar or related matters by other Divisions or the Commission.

The Counsel thus will have an information-gathering and information-providing role in these informal matters. Their participation is likely to commence at the request of Staff or one of the parties.

External Matters

The Counsel will be expected to develop and maintain contacts as appropriate with parties outside the Commission who frequently appear before the Commission or who are interested in Commission activities. Such contacts could include industry, legislators, representatives of other state agencies and other branches of government, and consumer groups.

These groups will be encouraged to raise issues with the Counsel that could impact the Commission or that might be expected to become Commission issues. The Counsel will then be able to

provide advice and counsel to the Commissioners regarding these issues and offer solutions to problems that are raised by these groups.

These contacts are not meant as a substitute for or circumvention of the formal processes that are required by due process and the SCC's rules. Instead, the Counsel will assist the Commissioners in the information-gathering process.

Exchanges of information are anticipated to be two-way. While the Counsel will not be binding the Commission on policy matters in their discussions, they will be able to listen and, where appropriate, bring to the Commissioners' attention such matters that deserve further scrutiny.

It is hoped that this role will enable the Commission to communicate more effectively with individuals and groups who wish to raise matters of concern with them that need not go through the formal process. These contacts are not meant as a substitute for, or to prevent, Staff engaging in its own outreach activities.

Staff has pursued many such activities on its own, and they are highly successful. Moreover, regular practitioners before the Commission maintain their own contacts with Staff and are encouraged to continue to do so.

Internal Matters

In light of Rule 60 of the SCC Rules, 5 VAC 5-20-60, and the new concentration on avoiding the appearance of impropriety, it is anticipated that Staff will bring matters to the attention of the Counsel that may or may not become formal proceedings in the

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SCC Declines to Enforce Arbitration Provisions *(continued)*

Second, International Paper argued that the Commission had jurisdiction to arbitrate under the broad authority provided by Va. Code § 56-38. That statute requires the Commission, upon the request of interested parties, to mediate controversies between public service companies and their employees and patrons. This, the Commission ruled, required both parties to request mediation, regardless of whether the parties had agreed by contract to request arbitration by the Commission. The Commission did not reach the question whether the arbitration provision in the International Paper - Dominion Agreement required the parties to request arbitration. The Commission found that the fact that Dominion had not joined in the request to arbitrate, rightfully or wrongfully, meant that the Commission could not proceed under § 56-38.

Finally, International Paper cited Va. Code § 56-6 as grounds for the Commission's jurisdiction to arbitrate. That section provides that a corporation aggrieved by a public service corporation in violation of any provisions of Title 56 may file a petition outlining its grievance and seeking relief from the Commission. Having

determined that neither §56-35 nor § 56-38 apply, and there being no other violations of Title 56 alleged, the Commission disposed of International Paper's argument that it was entitled to arbitration under §56-6.

The most significant question raised by the dismissal of International Paper's arbitration petition is whether one party to a Power Purchase Agreement can enforce the parties' agreement to submit to arbitration at the State Corporation Commission if the other party simply refuses mediation or arbitration there. In the case at issue, the parties disagreed as to whether the dispute even fell within the scope of their arbitration provision, and the federal court agreed with Dominion that it did not. The Commission, however, did not address the scope of the arbitration provision. Arbitration provisions are intended to allow the parties to avoid litigation, but the Commission's analysis in this case suggests that one party can force the other to court regardless of their agreement to an arbitration provision. ■

Assessing Environmental Impact of New Power Plants *(continued)*

public safety, whether such permit or approval is granted prior to or after the Commission's decision, shall be deemed to satisfy the requirements of this Section with respect to all matters that are (i) governed by the permit or approval or (ii) are within the authority of and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matter.

Thus, if a local, state or federal agency has considered a particular issue or concern in a permit or approval process, then the Commission will be bound by that determination. S.B. 554 also creates a structure for implementation. The DEQ and the Commission are tasked with entering into a memorandum of agreement regarding the "coordination of reviews" of the environmental impacts of proposed electric generating facilities that must obtain "certificates" from the Commission. Further, prior to the close of the record for an application for certification of an electric generating plant pursuant to Va. Code § 56-580, the DEQ shall provide to the Commission a list of all environmental permits and approvals that are required for the facility and shall specify any environmental issues identified during the DEQ review process that are not governed by these permits or approvals. The DEQ

may also recommend to the Commission that the Commission's record remain open pending completion of any required environmental review, approval or permit proceeding.

The Bill also provides that in the case of a facility proposed to be located in a serious non-attainment area for the one-hour ozone standard under the Federal Clean Air Act, the Commission shall not issue a decision approving such facility that is conditioned upon the issuance of any environmental permit or approval.

Finally, the Bill changes language in Va. Code § 56-46.1 that previously provided that the Commission may consider the effect of a proposed facility on economic development within the Commonwealth to language requiring that the Commission shall consider economic benefits. Even prior to passage, S.B. 554 served to shortcut the Commission's ongoing rulemaking on cumulative impact requirements. In a March 11, 2002 motion in the Rules Proceeding, Commission Staff noted that "S.B. 554 will significantly amend the environmental provisions of the principal statutes governing approval of electric generating facilities . . .," and moved the Commission to vacate the provision in its order in the Rules Proceeding that required Staff to issue a report addressing the proposed cumulative environmental impact language. S.B. 554 goes into effect July 1, 2002, but it will certainly have an impact on pending as well as subsequent merchant plant applications. ■

Brown Bag Luncheon Program

(continued from page 6)

Alex Skirpan said that it is not safe to assume that something filed with the SCC Clerk will quickly be routed to the appropriate SCC personnel. Accordingly, it is a good idea to provide a presiding Hearing Examiner with a courtesy copy of all filings. It is also good practice to inform the Hearing Examiner when something is filed that contains proprietary information.

Mr. Thomas further advised parties to respond to a Hearing Examiner's report even if such report is favorable to their position. Bill Chambliss, who serves as General Counsel to the SCC, noted that a new case management system will be available to the general public at the end of May so that any documents filed in an SCC proceeding will be accessible online. These documents will be scanned into the computer system; electronic filings will not be incorporated in the initial stages of the case management system.

Department of Social Services

John Moody serves as Hearing and Legal Services Manager in the Appeals and Fair Hearings Unit for the Virginia Department of Social Services. His duties include the supervision of the department's centralized administrative hearing process and the training of state hearing officers who are responsible for conducting state level hearings in benefits, services, and child support enforcement programs. Mr. Moody said that case workers in regional offices sometimes provide misleading advice to their customers, and he urged attorneys to consider undertaking pro bono work in this area.

Virginia Employment Commission

Our final speaker, Dean Ricks of the Virginia Employment Commission, noted that oral arguments in proceedings before the VEC are limited to evidence in the record, and it is important to know precisely what section of the record supports your position. Bringing a person with actual knowledge to the hearing was very helpful because live testimony carried more weight than written testimony such as declarations or affidavits. Useful sources of information concerning Virginia Employment Commission matters include the clerk's office and local offices, which have the Precedent Decision Manual.

All the speakers provided excellent written materials that were compiled in a booklet distributed at the CLE. Four copies of the booklet are still available. Please contact Cliona Robb at crobb@cblaw.com if you would like to receive one of these copies. ■

The SCC'S Counsel To The Commission: Identifying Their New Role (continued from page 9)

future. The Counsel will not be providing legal advice to Staff in these situations¹¹ but will determine whether such matters need to be addressed directly with the Commissioners and whether direct contact between Staff and the Commissioners on such matters is appropriate.

There are often Division-wide policy matters or matters that have been traditionally handled administratively that, in some cases, would have been brought to the attention of the Commissioners directly by Staff. The Counsel in these situations will use their judgment to determine which matters need to be further discussed with the Commissioners and whether *ex parte* contact is appropriate.

In this fashion, the spirit of the *ex parte* rule will be complied with even when the rule has not been legally triggered by the commencement of a "pending formal proceeding." Staff will also benefit from having clear guidance on how to address certain issues and if further consultation with the Commissioners is warranted.

So far, the new structural arrangement appears to be working well. SCC Chairman Clinton Miller describes it as "new and embryonic." He and his colleagues, Theodore V. Morrison, Jr. and Hullahen Williams Moore, expect the Counsel to provide advice and counsel to the Commissioners on a host of matters, including pending cases, informal complaints, externally-raised matters, and staff-generated requests.

Chairman Miller says, "We expect our Counsel to help us greatly with our own transition to be more effective and efficient handlers of the new competitive environment that still involves considerable Commission oversight and responsibility." He adds, "We're convinced the steps we are taking will enhance the regulatory climate for all parties concerned." ■



11. See note 7 regarding the role of the OGC in advising the Staff.

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Administrative Law News

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BACK TO THE FUTURE: WHERE DO WE GO FROM HERE?

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For more information, contact Conference Chair, Alex Skirpan (askirpan@scc.state.va.us) or
visit the VSB website at www.vsb.org/sections/ad/index.htm

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