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Administrative Law News

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SCC Conditionally Approves Biomass Facility

By Kiva Bland Pierce

In April, a divided Commission conditionally granted the request of South Boston Energy, LLC and Northern Virginia Electric Cooperative for a certificate of public convenience and necessity to construct, own, and operate a 49.9 MW biomass electric generating facility.[1] The location of the facility is in Halifax County, Virginia, on a "brownfield" site that previously housed a Georgia-Pacific particle board manufacturing facility.[2] The biomass fuel will primarily consist of wood byproducts or wood "slash," which is wood waste left over from timber harvesting.

The participants included the Division of Consumer Counsel of the Office of the Attorney General ("Consumer Counsel") and the Commission Staff. Numerous public witnesses supported the facility citing the economic development benefits the project might bring to the surrounding area. The applicants indicated that the project may be eligible for cash payments in lieu of tax credits for 30% of qualified expenditures.[3]

While the parties agreed that NOVEC needed additional generation capacity, [4] questions were raised regarding (i) the process used to select the facility, (ii) the cost methodology, and (iii) the adequacy of the fuel supply. Consumer Counsel and Staff took issue with NOVEC's cost of alternative facilities because NOVEC assigned $50 million in patronage capital[5] to the biomass facility, with no associated equity financing costs,[6] but not to the alternatives. Consumer Counsel and Staff argued that such methodology gave the biomass facility an advantage over the alternatives and prevented

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ABOUT THE EDITOR Ashley B. Macko is Counsel in the Energy and Environmental Department at McGuireWoods LLP in Richmond, Virginia. Before joining McGuireWoods in 2011, she served for six years as an Assistant Attorney General within the Division of Consumer Counsel, Office of the Attorney General of Virginia. Prior to that, 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.

Message from the Chair

2010-2011 has been an active and interesting year for your Section and plans will soon be underway for 2011-2012.

The highlight of our year was the 29th National Regulatory Conference that took place in May in Williamsburg, which I had the pleasure of heading-up this year. The conference is unique in that it is jointly-sponsored by the State Corporation Commission, the Marshall-Wythe School of Law at the College of William & Mary and our Administrative Law Section. This year's conference was very well-received and well-attended. Attendance was in excess of 170 for the second consecutive year. We particularly enjoyed our keynote speaker, Scott Tinker, who presented a sneak peak into his upcoming documentary on energy.

If you have never attended this conference, I ask that you consider attending next year. Information about the conference will be circulated electronically next spring and it will also be posted on our website at http://www.vsb.org/sections/ad. The head of our planning committee for the 2012 conference will be Louis Monacell of Christian & Barton and the planning committee begins meeting in September.

This past year, Vishwa Link of McGuireWoods planned our annual Brown Bag Luncheon which featured a panel of experts in mediation in the administrative law context, including Justice Elizabeth B. Lacy (Ret.), Chief Administrative Judge and Director of Hearings Robert S O'Neal, Virginia Alcoholic Beverage Control, Brooke Anne C. Hunter, Deputy Commissioner of the Workers Compensation Commission and moderated by Mark Shuford. We also sponsored a CLE program in June at the VSB Annual Meeting. And, last but not least, we published two editions of our *Administrative Law News* edited by Ashley Macko of McGuireWoods.

Finally, I want to recognize the leadership of our outgoing Section Chair, Borden Ellis of NiSource and the ongoing assistance of Catherine Huband of the State Bar. Should you wish to contact me to discuss our Section, please feel e-mail me at tom.walker@troutmansanders.com. — Tom Walker

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Case to Watch: Supreme Court of the United States grants certiorari in climate change case of *Connecticut v. American Electric Power*

By Ashley B. Macko

On April 19, 2011, the Supreme Court of the United States heard oral arguments in the case of the *American Electric Power v. Connecticut*, an appeal from a Second Circuit Court of Appeals decision[1] involving claims of federal common law nuisance for climate change against major greenhouse gas emitters. The decision may determine whether federal common law permits states and private entities to sue utilities for allegedly contributing to global warming. The suit was brought by, among others, eight states and New York City against six electric power corporations that own and operate fossil fuel-fired power plants in twenty states. The states sought abatement from the utilities of their contribution to the global warming which they claim is a public nuisance. The states asserted that the utility companies contribute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions, and U.S. electric power plants constitute "ten percent of worldwide carbon dioxide emissions from human activities." The Plaintiffs sought relief in the form of capping and reducing the Defendants' emissions, but no monetary damages.

The District Court had originally dismissed the case as presenting on a non-justiciable "political question" finding that the claim would be more appropriately addressed by another branch of government. The District Circuit did not reach the issue of whether the plaintiffs had standing to sue. The Second Circuit reversed in a 139-page decision, finding that the claims did not fall within the political question exclusion and that the plaintiffs had standing to bring the case. On appeal, the Supreme Court granted certiorari on three questions: whether the states lacked standing to sue, whether the Clean Air Act displaced the federal common law of nuisance and whether the claim is a political question that should be dismissed.

Standing. The Second Circuit found that the states had Article III standing including the elements of injury, causation and redressability. Courts have found certain plaintiffs lack standing when they allege generalized injuries from global warming reasoning that the conduct at issue (emission of carbon dioxide) is not limited to the named defendants, but in fact results from numerous activities across the world. Thus, there is a question whether even a favorable decision from the courts in these types of cases would impact climate change, the alleged injury. The Second Circuit found that the states had *parens patriae* standing to sue and that states have a legitimate interest in protecting their natural resources and the health of their citizens. Additionally, the Second Circuit found the remedy sought by the Plaintiffs would reduce the harm alleged.

Displacement. The plaintiffs' asserted a global warming-related injury based in the federal common law doctrine of nuisance. Federal common law only exists in the absence of federal legislation addressing the same issues and is subject to "displacement" by such legislation. The Supreme Court had held in *Massachusetts v. EPA*[2] that the Clean Air Act provides clear authority for EPA to regulate greenhouse gases. The Second Circuit acknowledged that EPA had not issued a final endangerment finding[3] and has not issued regulations limiting greenhouse gas emissions from stationary sources. Based on this inaction, the court reasoned, the claim asserted by the plaintiffs was not yet covered or "displaced" by the implementation of the CAA.

Political Question. The Second Circuit found that the suit was limited in scope to the parties to the suit such that any injunction issued would be limited to restricting the defendants' emissions. The court

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An Overview of Pole Attachment Regulation

By Charlotte P. McAfee

Pole attachments may not captivate dinner party audiences, but they are a common headache among providers of electric, telecommunications and cable service. Federal regulation of pole attachment fees and arrangements is not straight-forward to say the least, and the application of these regulations can be impenetrable.

Since 1978, the Federal Communications Commission ("FCC") has regulated the rates that pole-owning utility companies – primarily telephone and electric utilities – charge cable television companies and telecommunications service providers for attachment to their poles. The FCC does not regulate attachments to poles owned by electric cooperatives or municipalities.[1] Through its regulation, the FCC seeks to assure that the rates and terms of attachment are just and reasonable and that access to the utilities' poles is provided in a nondiscriminatory manner.

The methodologies for calculating pole attachment rates are prescribed by the FCC pursuant to Section 224 of the Communications Act of 1934, as amended (the "Pole Attachment Act"). Pursuant to the Pole Attachment Act, the FCC provides a formula for calculating the maximum fee for two classifications of attachments – attachments that provide telecommunications services and attachments for cable television systems that do not also provide telecommunications service.[2] Basically, the maximum attachment rate is the "space factor" – the space occupied by the attachment relative to the pole characteristics – multiplied by the utility's net cost of a bare pole and carrying charge rate, the latter two factors to be determined from the electric utility's annual Form 1 filing with the Federal Energy Regulatory Commission or the telecommunication utility's annual Automated Reporting Management Information System with the FCC. The difference between the telecommunications rate and the cable rate is the calculation of the space factor. For cable attachments, the space factor is the space occupied by the attachment divided by the total space on the pole available for attachments. For telecommunications attachments, the space factor takes into account the number of attaching entities with the divisor being the height of the pole. The telecommunications rate is generally higher, and can be twice the cable rate or more.[3]

The foregoing approach to determining the maximum allowable attachment fee represented a shift from the original approach of considering a rate as "just and reasonable" so long as it assured a utility the recovery of its incremental costs of providing attachments, and was not more than the fully-allocated cost of operating and maintaining the pole attributable to the space occupied by the attachment. The shift away from a range of acceptable rates began in 1978, but was not applied to telecommunication providers' attachments until the Telecommunications Act of 1996. The legal presumption is that the applicable FCC formula "provides for much more than marginal cost necessarily provides just compensation" to the utility pole owner.[4]

On April 7, 2011, the FCC adopted a Report and Order that substantially revised its pole attachment rules. For the most part, the rule changes were designed to help wireline and wireless broadband providers that seek to attach to utility poles, both by shortening the pole attachment process and by lowering pole attachment rates. In adopting this Report and Order, the FCC noted that attachment rates averaged $7 per foot per year for cable companies to $20 or more for some telephone companies.[5] The new rules reduce the telecommunications rates to a level closer to the lower rate payable by cable companies "by adopting a definition of cost that yields a new 'just and reasonable' telecommunications rate;" confirm that that the same rates apply for wireless

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State Corporation Commission Approves First SAVE Plan By T. Borden Ellis

On April 21, 2011, the Virginia State Corporation Commission ("Commission") approved Washington Gas Light Company's ("WGL") Steps to Advance Virginia's Energy (SAVE) Plan and SAVE Rider with certain modifications.[1] WGL's SAVE Plan was the first one to be considered by the Commission under the recent SAVE Act,[2] which became effective in July of 2010. The SAVE Act allows natural gas utilities in Virginia to develop plans for certain infrastructure replacement or "SAVE Plans" and recover costs through "SAVE Riders," a recovery mechanism separate from customer rates established in a rate case.

To be eligible for inclusion in a SAVE Plan the infrastructure replacement must be "natural gas utility facility replacement projects that (i) enhance safety or reliability by reducing system integrity risks associated with customer outages, corrosion, equipment failures, material failures, or natural forces; (ii) do not increase revenues by directly connecting the infrastructure replacement to new customers; (iii) reduce or have the potential to reduce greenhouse gas emissions; (iv) are commenced on or after January 1, 2010; and (v) are not included in the natural gas utility's rate base in its most recent rate case using the cost of service methodology set forth in § 56-235.2, or the natural gas utility's rate base included in the rate base schedules filed with a performance-based regulation plan authorized by § 56-235.6, if the plan did not include the rate base.[3] A SAVE Plan must be filed with the Commission for approval.[4] The plan must provide the following: a timeline for completion of the replacement projects; the estimated costs of the proposed projects; a schedule for recovery of the costs through the SAVE Rider; and demonstrate that the plan is prudent and reasonable.[5] Under a SAVE Plan, at the end of each 12 month period, the natural gas utility must reconcile the difference between the recognized costs and the amount recovered from the SAVE Rider and submit the reconciliation and corresponding proposed adjustment to the rider to the Commission for approval. The Commission must approve or deny the adjustment within 90 days.[6]

WGL's SAVE Plan proposed $116.5 million in expenditures on utility facility replacement programs over a five year period.[7] WGL projected that the SAVE Rider would add $4.48 per year to the typical residential customer's bill in 2011.[8] The proposed SAVE Plan included the following replacement projects: (1) Bare and Unprotected Steel Service Replacement Program; (2) Bare and Unprotected Steel Main Replacement Program; (3) Mechanically Coupled Pipe Replacement Program; and (4) Enhancement of its Optimain Decision Support Computer Program.[9]

In its Order, the Commission approved WGL's SAVE Plan and Rider, but made modifications. The Order addressed implementation, accounting and filing issues which had been addressed at the hearing and in briefs of the parties. The Commission approved the specific infrastructure replacement projects proposed by WGL.[10] The Commission also found that the determination of infrastructure replacement costs must reflect the netting of plant retirements associated with the projects. It reasoned that "the value of plant retirements is an integral and necessary component for the purpose of calculating the costs incurred on a replacement project."[11] In doing so, the Commission found that such recognition does not violate the SAVE Acts prohibition against "examining other revenue requirement or ratemaking issues" or "offsetting other Commission-approved cost of service or revenue requirement," and avoided a possibility of double recovery.[12]

The Commission then turned to WGL's proposed weighted cost of capital. The SAVE Act includes a return on investment as an eligible infrastructure replacement cost. The SAVE Act also states that "[i]n calculating the return on the investment, the Commission shall use the natural gas utility's regulatory capital structure as calculated utilizing the weighted

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Commission Requests Comments and Schedules Hearing on Proposed Changes to Discovery Rules Applying to Commission Staff By Ashley B. Macko

On May 26, the Commission issued an order requesting comments and scheduling a hearing on proposed changes to Part IV of the Commission's Rules of Practice and Procedure specifically related to discovery requests propounded on Commission Staff. Comments are to be filed by July 5 and the hearing is scheduled for July 12. The Commission order includes specific proposed amendments to the current Rules. Under the proposed amendments, different discovery requirements will apply to regulatory proceedings under 5 VAC 5-20-80 and adjudicatory proceedings under 5 VAC 5-20-90, but generally the amendments increase the ability of respondents and parties to engage in discovery of Commission Staff. In regulatory proceedings, under the proposed Rules, Staff will be subject to additional discovery on documents relied upon as a basis for recommendations or assertions in prefiled testimony, Staff Reports or exhibits filed by Staff. Staff will also be subject to discovery on the identity of other formal proceedings where testimony has been given on substantially similar subject matter. The new discovery rules would also apply to consultants of Commission Staff filing testimony. No discovery on Staff would be allowed until after Staff files testimony in a proceeding. Legislation in this area failed in the 2011 General Assembly (SB 1413, HB 2451). ❊

About the Author: See About the Editor, p. 1

Verizon Obtains Waiver of Requirement To Distribute Printed Directory of Residential Listings Subject To Conditions By Ashley B. Macko

On May 5, 2011, the Commission granted Verizon's request for a waiver from annual telephone directory publication and distribution requirements of the Commission's Rules Governing Local Exchange Telecommunications Carrier Retail Service Quality Rules, Rule 20 VAC 5-428-80 A ("Rule"). As noted by the Commission, a number of states have approved similar requests. Verizon asserted as a basis for its request that customers are less reliant on printed white pages in favor of alternative methods of accessing listings including internet-based sources. Verizon also cited the environmental impacts of the distribution in terms of tons of paper used and energy consumed in printing, binding and distributing directories. Verizon indicated that it would make a printed residential directory available at no charge upon request as well as make it available online at no charge. Business and governmental directories would continue to be delivered to customers, likely as part of the Yellow Pages. The waiver also applies to other local exchange carriers that rely on Verizon to comply with the Rule. The Commission granted the waiver, characterized as an interim waiver, subject to a number of conditions. Among those conditions, Verizon is required to treat a request for a printed residential directory as a continuing request that does not have to be renewed each year. Verizon is also required to ensure the white page directory is highly searchable from any site within its primary website. Verizon will notify its customers of the process to obtain a free residential white page directory by press release and quarterly billing insert. The Company must also file regular reports with Commission Staff who, in turn, must file reports with the Commission. ❊

About the Author: See About the Editor, p. 1

Commission Grants Second Withdrawal of PATH Application By Ashley B. Macko

On May 24, 2011, the Commission granted the request of PATH Allegheny Virginia Transmission Corporation to withdraw its second application for approval of the transmission line known as the Potomac-Appalachian Transmission Highline ("PATH Project"), a proposed 765 kilovolt transmission line that would begin in West Virginia and travel across the Virginia counties of Frederick, Loudoun and Clarke and terminate in Maryland. The first application was filed in May 2009 and the motion to withdraw was granted in January 2010. The second application was filed in September 2010. Prior to filing the motion to withdraw, the Applicant had requested the Commission hold the proceeding in abeyance in December 2010, but its request was denied by the Hearing Examiner over concerns about potential federal jurisdiction. The motion to withdraw was filed February 28, 2011 and cited PJM's updated load forecast indicating that projected violation of reliability standards that PATH was designed to resolve have advanced further into the future. The Commission adopted the Hearing Examiner's recommendation that the motion to withdraw be granted subject to certain filing requirements related to PJM analyses underlying the need for the PATH Project. Just as they had argued in the first case, respondents requested the dismissal be with prejudice; however, the Commission agreed with the Hearing Examiner's analysis that the certification proceeding fell within the Commission's legislative authority and subject to the public interest, which "may change over time, due to changes in circumstances . . . " and therefore it was inappropriate to dismiss with prejudice.

Case No. PUE-2010-00115 (Second Application)
Case No. PUE-2009-00043 (First Application) ❊

About the Author: See About the Editor, p. 1

Case to Watch *(continued)*

took the view that the case fell squarely within the pattern of air and water pollution cases that courts have long successfully adjudicated. Simply because the injury complained of was part of a world-wide problem did not bar action by states against the utility companies.

Commentators have generally asserted that based on the questions asked by the Court, the likely result will be some sort of reversal of the Second Circuit's decision. ❊

About the Author: See About the Editor, p. 1

Note from Editor: Just as this edition was going to press, the U.S. Supreme Court issued its decision in *American Electric Power v. Connecticut* reversing the 2nd Circuit on the issue of displacement, but affirming, equally divided, on standing. The Court held that the Clean Air Act and EPA's actions to regulate greenhouse gases has displaced the Plaintiff's federal common law nuisance claims. Commentators have noted that by deciding this important case on seemingly narrow grounds, the Supreme Court's decision apparently left the door open for future climate change lawsuits.

1. 582 F.3d 309 (2d Cir. 2009).
2. 549 U.S. 497 (2007).
3. The EPA had not issued the final endangerment finding as of the date of the Second Circuit's decision. The EPA has subsequently made that finding.

Biomass Facility *(continued)*

a true cost comparison. Additionally, Consumer Counsel and Staff expressed concern over NOVEC's lack of a formal selection process or a formal request for proposals for new generation. With regards to the fuel supply in the vicinity of the unit, Consumer Counsel noted that adequate fuel supply was an inherent concern with biomass facilities, and that the information provided by the applicants did not alleviate those concerns.[7] Because of these issues, Consumer Counsel determined that it could not "endorse this proposed project as being in [NOVEC's] ratepayers' interest."[8] Staff concluded that it did not oppose the facility "per se" but suggested numerous conditions to mitigate the concerns.[9]

Despite the "numerous deficiencies in NOVEC's case"[10] and "looking beyond the multitude of inconsistencies, as well as deficiencies, in NOVEC's planning process and reaching a conclusion based on the unique facts in this record,"[11] the Commission conditionally approved the biomass facility on the grounds that it was "not otherwise contrary to the public interest."[12] The conditions include a limit on expenditures in the amount of $180 million.[13] To address the fuel supply concerns raised, the Commission ordered NOVEC to file a detailed waste wood procurement plan detailing the supply of the facility, for at least 350,000 tons per year, for the first five years.[14] Acknowledging the validity of concerns expressed on the lack of formal selection process, the Commission required NOVEC to file by August 1 an integrated resource plan and a detailed update on its progress in issuing request for proposals to meet its generation capacity needs.[15]

In a dissenting opinion, Commissioner Dimitri, stated that he could not "conclude that the project, as developed and presented by NOVEC, is required by the public convenience and necessity or that the project is not otherwise contrary to the public interest."[16] He stressed the importance of cost in the evaluation process and found that the evidence failed to illustrate NOVEC's due diligence.

With the Commission's order, NOVEC can now move forward with the completion of its biomass facility as long as it complies with the conditions imposed. ❊

About the Author: Kiva Bland Pierce is an Assistant Attorney General in the Insurance and Utilities Regulatory Section. She joined the Attorney General's Office in 2007 after working in private practice concentrating on regulatory, administrative, and business law in addition to general litigation. She received her law degree from the University of Richmond, T. C. Williams School of Law and her undergraduate degree from Louisiana State University.

1. *Application of South Boston Energy, LLC For approval to construct, own and operate a nominal 49.9 MW biomass electric generating facility in Halifax County pursuant to Va. Code § 56-580 D*, Case No. PUE-2010-00126, Order on Application (April 28, 2011).
2. The EPA defines a brownfield site as real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. Available at http://epa.gov/brownfields/overview/glossary.htm
3. In order to allow one criteria to be met, that of commencing work on the facility by Dec. 31, 2010, the Commission granted the request for interim authority to begin certain construction of the facility. Order for Notice and Hearing, Nov. 9, 2010).
4. Order at 10.
5. NOVEC received these funds when it left the Old Dominion Electric Cooperative.
6. Testimony of Staff Witness Walker at 12.
7. Consumer Counsel Post-hearing brief at 4.
8. Consumer Counsel Post-hearing brief at 9.
9. Staff Post-hearing brief at 28.
10. Order at 6.
11. Order at 9.
12. Order at 11; Va. Code § 56-580D.
13. Order at 14.
14. Order at 13.
15. Order at 12.
16. Order at 20.

Pole Attachment Regulation *(continued)*

attachments as for other telecommunications attachments; establish time limits for attachments and remove the caps on penalties for unauthorized attachments. [6]

The FCC calculation of the maximum rate for pole attachments overrides agreements to the contrary,[7] and, in fact, is the primary authority over all pole attachment matters not regulated by the state. States are permitted to preempt FCC jurisdiction and regulate the terms of attachments themselves, and most states that have done so have generally followed the FCC's pole attachment rate standards. As of May 19, 2010, twenty states and the District of Columbia have certified to the FCC that they regulate pole attachments.[8] Virginia is not one of those states.

On April 15, 2011, in Case No. PUE-2011-00033, the Commission issued an Order establishing a proceeding and scheduling a hearing for determining appropriate regulation of pole attachments and cost sharing in Virginia. The Order laid out the discussion of pole attachments during the 2011 General Assembly session – specifically, proposed House Bill 1439 considered by the House of Delegates Commerce and Labor Committee would have required the Commission to set rates, terms and conditions for pole attachments of telephone and cable companies on the poles of electric cooperatives using the FCC principles. A similar bill, Senate Bill 890, was considered by the Senate Commerce and Labor Committee. Consideration of the proposed legislation was ultimately deferred until a Commission study could be completed.

Although the proposed legislation and letter requesting a Commission study were limited in scope to attachments to attachments to poles owned by electric cooperatives, the Commission's Order broadened its inquiry to all pole attachments. The Commission included in the service list of recipients of the Order all utility pole owners within the Commonwealth, and directed those owners to provide copies to each entity with whom they have pole attachment arrangements. The Order posed 13 questions pertaining to regulation of pole attachments and directed the filing of six pieces of information from the utility pole owners. The questions set out by the Commission concern the appropriate methodology for establishing rates, requirements for pole attachment agreements and negotiations, penalties, dispute resolution, safety and reliability issues, procedures for installation and maintenance of attachments, Commission jurisdiction over attachers, and the existence of other interests and policies impacting pole attachment regulation.

The deadline for filing comments to the Commission Order was June 15, 2011 and the public hearing will be held on July 13, 2011 at the Commission. ❋

About the Author: Charlotte P. McAfee is an Associate in the Regulated Markets and Energy Infrastructure practice of Hunton & Williams LLP in Richmond, Virginia. Charlotte received her J.D. from Washington & Lee School of Law and her undergraduate degree from the College of William & Mary.

1. 47 U.S.C. § 224(a)(1).
2. *See, e.g.*, FCC Enforcement Bureau, Pole Attachments Complaints, available at http://transition.fcc.gov/eb/mdrd/PoleAtt.html.
3. Until recently, the penalty for unauthorized attachments was capped at the maximum amount of the annual fees that would have been payable over five years or less.
4. 17 FCC Rcd. 25238 at ¶ 6 (FCC 2002) (internal quotations omitted).
5. *See* Press Release, FCC, FCC Promotes Robust, Affordable Broadband by Reducing Costs & Delays in Access to Infrastructure (Apr. 7, 2011), at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0407/DOC-305620A1.pdf.
6. Report and Order and Order on Reconsideration at 5-6, Implementation of Section 224 of the Act - A National Broadband Plan for Our Future (FCC 11-50, April 7, 2011).
7. *See, e.g.*, 17 FCC Rcd. 25238 at ¶ 5 (FCC 2002).
8. FCC Public Notice, "States that have certified that they regulate pole attachments," DA 10-893 (May 19, 2010), at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-893A1.pdf.

First SAVE Plan *(continued)*

cost of capital, including the cost of debt and the cost of equity used in determining the natural gas utility's base rates in effect during the construction period of the eligible infrastructure replacement project." [13] Since WGL's existing rates were determined by stipulation rather than by a specific cost of debt and cost of equity, the question of the proper determination of the cost of capital arose. The Commission noted WGL's pending rate case, and resolved the matter by allowing WGL to utilize the proposed cost of capital as a "temporary placeholder subject to true up" for the purposes of the SAVE Rider. After the weighted average cost of capital is determined in WGL's pending rate case, it will be used, dating back to the effective date of the SAVE Rider, in WGL's reconciliation adjustment.[14]

The Commission permitted cost recovery for infrastructure replacement projects constructed on or after June 2010 which was the date when WGL began to install plant subject to the SAVE Rider. In doing so, the Commission noted that the SAVE Act contemplated recovery for replacement projects that began prior to the implementation of the statute since it included projects commenced after January 1, 2010 and the Act did not become effective until July 2010.[15] Such a finding by the Commission requires WGL to establish a new regulatory asset effective June 2010, even though WGL had agreed to not create new regulatory assets prior to October 2011 in its prior Performance Based Rate Case.[16] The Commission found, based on the specific directive in the SAVE Act, that neither WGL's previous obligation, nor the Commission Order prohibiting the creation of new regulatory assets prior to October 2011, stood as a "legal impediment" to establishing such a regulatory asset in accordance with the SAVE Act."[17]

The Commission modified WGL's proposal for review and approval for its annual SAVE Rider rates. The annual SAVE Rider will be docketed as a formal proceeding and the Commission set out a filing schedule that combined the annual reconciliation required by the SAVE Act with a review of WGL's annually submitted proposed SAVE Rider rates based on its projected expenditures for the future calendar year. [18]

The Commission approved the SAVE Plan total of $116.5 million, ordering that WGL may exceed that total by 5%. The Commission also set limits for each calendar year allowing WGL to spend up to 125% of the annual amount set forth in the Order so long as it doesn't exceed the total SAVE Plan limits. In addition, the Commission set forth specific allocation percentages of the total amount for the separate SAVE Plan project types, but allowed WGL flexibility to modify each project type allocation by up to 10%.[19] WGL may also request modifications to the limits set out by the Commission for good cause shown. Finally, the Commission ordered that WGL include the SAVE Rider amounts in a separate line item on customer bills labeled "All Applicable Riders."[20]

WGL's SAVE Plan and Rider became effective for bills rendered on and after May 1, 2011.[21] ❊

About the Author: T. Borden Ellis is a Senior Counsel with NiSource Corporate Services Company where he represents Columbia Gas of Virginia in regulatory matters. Borden is the immediate past Chair of the Administrative Law.

1. *Application of Washington Gas Light Company, For Approval of a SAVE plan and rider as provided by Va. Code § 56-604*, Order Approving SAVE Plan and Rider (April 21, 2011)(hereinafter Order).
2. Va. Code § 56-603 et seq.
3. Va. Code § 56-603.
4. Va. Code § 56-604.
5. *Id.*
6. *Id.*
7. Order at 1.
8. *Id.*
9. *Id.* at 2.
10. *Id.* at 5.
11. *Id.* at 6.
12. *Id.*
13. Va. Code § 56-603.
14. Order at 8.
15. *Id.*
16. Case No. PUE-2006-00059.
17. Order at 9.
18. *Id.* at 10-11.
19. *Id.* at 12.
20. *Id.* at 13.
21. *Id.*

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."

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