Administrative Law News

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SAVE THE DATE

Thirty-Fourth Annual National Regulatory Conference

May 19-20, 2016

Marshall-Wythe School of Law, College of William & Mary Williamsburg, Virginia

Supreme Court Session Set to Have Major Impact on Energy Markets

By Cliona Mary Robb

For those advocating for an expansive view of Federal Energy Regulatory Commission ("FERC") authority and for more generous compensation of demand response activity, the United States Supreme Court in its January 25, 2016 decision in *FERC v. Electric Power Supply Association ("FERC v. EPSA")* certainly delivered.[1] The power suppliers who advocated for less generous compensation and for the elimination of demand response from wholesale markets clearly lost. What remains to be seen is whether this landmark decision expanding FERC authority signals the Court's inclination to diminish state jurisdiction impacting energy markets.

The case stemmed from FERC's Order No. 745, which provided additional incentives for demand response by requiring market operators to pay the same price to demand response providers for reducing energy demand as the market operators pay to generators for producing energy, as long as a net benefits test is met to ensure that accepted bids actually save consumer money.[2] Generators objected, saying that the retail price should be subtracted from the compensation paid to demand response providers. Trade groups representing power suppliers challenged Order No. 745, arguing that it operated at the retail level and so was beyond FERC's jurisdiction, or, if the Court would not go that far, that FERC's ruling on compensation was arbitrary and capricious.

Justice Kagan, writing for the majority, rejected the argument that FERC had overreached, saying that the regulation affected retail sales only incidentally:

> It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that

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ABOUT THE EDITOR James G. Ritter is an associate in the Energy and Telecommunications practice group at Christian & Barton, LLP in Richmond. He focuses on regulatory matters before state and federal administrative entities involving electric, natural gas, and water utilities and cable companies. He also has experience working on behalf of telecommunications providers and local governments in Virginia. He earned his law degree from Washington & Lee University School of Law and his undergraduate degree from the University of Virginia.

Message from the Chair

After serving on the Board of Governors in one capacity or another for eight years, it has been a privilege to serve as the Chair of the Administrative Law Section this year. The Section has been hard at work planning a number of exciting programs for our membership.
As it has been for decades now, our premier activity will be the National Regulatory Conference on May 19th and 20th at the College of William & Mary's Marshall-Wythe School of Law in Williamsburg. The theme for the Conference this year is: *"Out with the Old, In with the New: Preparing for Our Energy Future."* The Conference will feature panels on a variety of legal and regulatory topics, including emerging technologies; aging infrastructure and replacement programs; new interstate natural gas pipelines; distribution system operators and the New York REV Model; and state implementation of the Clean Power Plan.

The NRC Planning Committee – chaired this year by Charlotte McAfee – has lined up a slate of expert panelists to explore these topical issues and generate thoughtful and lively debate. The NRC is expected to be approved for nine hours of CLE credit, including two hours of ethics. In addition to educational benefits, the NRC is a great opportunity to socialize with regulators and other members of the Section, and all participants are invited to attend the Commissioners' reception on Thursday evening following the ethics presentation by Tom Spahn. Registration is now open and available online at: http://www.vsb.org/site/sections/administrativelaw/nrc. I hope you will consider joining us in Williamsburg. If you need additional information, please contact our NRC coordinator, Laura Martin (laura.martin@scc.virginia.gov).

In addition to the National Regulatory Conference, our Section recently held its annual Brown Bag CLE lunch meeting at the Virginia State Bar's offices in Richmond. This year's program was entitled *"Tips from the Trenches: Practice Tips for Administrative Practitioners,"* and it featured the Honorable Mark Christie (State Corporation Commission); the Honorable Elizabeth B. Lacy (Ret.) (Supreme Court of Virginia); and the Honorable Wesley G. Russell, Jr. (Court of Appeals of Virginia). The panelists provided valuable tips for improving regulatory litigation practice, including insights into what makes for effective legal writing, oral argument, and cross-examination. A great crowd turned out for the event, and attendees received one hour of CLE credit.

As the year moves on, please do not hesitate to contact me or the other members of our Section's Board of Governors with any thoughts or ideas you may have. We are always open to suggestions about how the Section can provide value to its members, and we welcome your participation. And we encourage you to contribute to the newsletter. If you'd like to submit an article, contact our editor, Jamie Ritter (jritter@cblaw.com). *~ Ashley*

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SCC Updates Net Energy Metering Regulations By Kristian M. Dahl

Net energy metering continues to be an issue of concern for electric consumers in Virginia, and the Virginia State Corporation Commission (SCC) continues to ensure its regulations keep pace with legislative changes.

Net energy metering is a type of distributed generation that allows customers with an eligible (*i.e.*, qualifying renewable) on-site power generator to offset the cost of their electric usage with energy they produce, with the "net" being the electricity sent back to one's franchised utility electric grid when the customer-generator's system generation exceeds the on-site demand the customer is consuming. Net energy metering service addresses the particulars of such arrangements, including defining what generators qualify, what rates and over what billing periods consumers get compensated at (normally as a credit to bills), and how that power is safely and reliably managed with a utility's local distribution facilities. With net metering, customer-generator systems are typically "behind the meter," *i.e.*, a system producing power intended for on-site use in a home, office building, or other commercial facility and on the owner's property, not on the side of the electric grid/utility.

In the past two years, the Commission has approached its net energy metering regulations twice through formal rulemakings, first to implement regulations specific to agricultural net metering[1] and then, at the end of 2015, amending the Commission's general net metering regulations.[2] The Commission's *Regulations Governing Net Energy Metering* ("Net Energy Metering Rules" or "Rules")[3] primarily focus on utilities in their provision of net energy metering service to their customers with qualifying renewable sources, serving as "customer-generators." The regulations apply broadly, including to customers of both investor-owned utilities and electric cooperatives, although there is room in the regulations and, ultimately, a given utility's tariff governing the net energy metering service, to address the unique differences that exist between utilities. The SCC's Net Energy Metering Rules include conditions for interconnection and metering, billing, and contract requirements between net metering customers and their electric distribution companies and energy service providers.

Agricultural Net Metering Amendments

Agricultural Net Metering is available for customers in Virginia that operate an electrical generating facility "consisting of one or more agricultural renewable fuel generators having an aggregate generation capacity of not more than 500 kilowatts (kW) as part of an agricultural business under a net metering service arrangement." Virginia agricultural net metering customers may "be served by multiple meters of one utility that are located at separate but contiguous sites and that may be aggregated into one account."[4]

On January 27, 2014, the SCC entered an Order Establishing Proceeding to consider revisions to the Net Energy Metering Rules to reflect statutory changes enacted by Chapter 268 of the 2013 Acts of Assembly allowing for such agricultural net energy metering. In that proceeding (docketed as and documents available on the SCC's website by searching Case No. PUE-2014-00003), the Commission issued Proposed Rules, limited only to implementing those legislative amendments. Several parties, including the Virginia Farm Bureau, customer interests and a large number of the Commonwealth's investor-owned utilities and electric cooperatives filed comments in the proceeding. The comment process led to disagreement over several definitions such as what constitutes an "agricultural business," or what "aggregated" and "contiguous" mean in the context of the revised rules, as well as how customers can be charged for certain net energy metering equipment. Disputes over the scope of the definition of "eligible agricultural customer-generator" were resolved as was the proper advance notice to be given an electric utility or cooperative. Changes were also adopted on how final electrical inspections are to occur and to the Interconnection Form that would be

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Supreme Court Session *(continued)*

> occur on the wholesale market have natural consequences at the retail level. And so too, of necessity, will FERC's regulation of those wholesale matters.[3]

The dividing line between state and federal jurisdiction is a fundamental aspect of FERC's authority, which stems from the Federal Power Act ("FPA").[4] The FPA was enacted to close the so-called "*Attleboro* gap" by addressing the inability of state public utility commissions to regulate beyond state borders.[5] The FPA gave the Federal Power Commission, FERC's predecessor, the authority to regulate "the sale of electric energy at wholesale in interstate commerce," including both wholesale electricity rates and any rule or practice "affecting" such rates, but it leaves the regulation of "any other sale" of electricity (*i.e.*, retail sales to end users) to the states.[6]

The Court found that FERC may regulate wholesale market operators' compensation of demand response bids because:

> 1. the practices at issue directly affect wholesale rates;[7]
>
> 2. FERC has not in Order No. 745 regulated retail sales, and its justifications for regulating demand response activities are only about improving the wholesale market;[8] and
>
> 3. the contrary view would conflict with the FPA's "core purposes" of protecting against excessive prices and ensuring effective transmission of electric power.[9]

The Court then went a step further and found that FERC's decision to compensate demand response providers at the locational marginal price, which is the same price paid to generators, instead of paying them the locational marginal price less the retail rate for electricity, was not arbitrary and capricious because FERC provided a detailed explanation for that decision and responded at length to contrary views.[10]

FERC v. EPSA demonstrates how far the Court will go in expanding FERC authority under the rubric of concurrent jurisdiction and cooperative federalism. The fact that demand response payments were made to retail end users did not disqualify FERC from regulating such compensation. The Court reasoned that in an increasingly competitive interstate electricity market, FERC has properly sought to encourage the creation of nonprofit entities to manage regions of the nation's energy grid. These wholesale market operators—for Virginia and surrounding states, that role is played by PJM Interconnection, LLC ("PJM")—generally administer multistate portions of the transmission grid to ensure reliable transmission of electricity, and they also set wholesale electricity prices by holding competitive auctions. As aptly described in the Court's syllabus:

> These auctions balance supply and demand continuously by matching bids to provide electricity from generators with orders from utilities and other "load-serving entities" (LSEs) that buy power at wholesale for resale to users. All bids to supply electricity are stacked from lowest to highest, and accepted in that order until all requests for power have been met. Every electricity supplier is paid the price of the highest-accepted bid, known as the locational marginal price (LMP).[11]

During periods of high electricity demand, which can occur during a polar vortex or during the hottest part of a summer day, prices can rise dramatically as the most inefficient generators come on line or as demand starts to outstrip supply. These peak periods can also risk overloading the grid and threaten rolling blackouts. Faced with these challenges, PJM and other market operators adopted wholesale demand response programs to pay customers for commitments to reduce their power during these peak periods. Demand response offers could be bid into the wholesale market just as bids to supply energy are, and when it costs less to pay consumers to refrain from using power than it does to pay producers to supply more of it, demand response can lower these wholesale prices and increase grid reliability.[12]

To encourage demand response, FERC initially

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issued Order No. 719, which required entities like PJM to receive demand response bids from aggregators for electricity consumers, with an exception for instances in which the state regulatory commission governing those retail customers had barred demand response participation.[13] To further encourage demand response, FERC later issued Order No. 745, whose determination that demand response should for the most part be compensated on par with the compensation given to generators led to the court challenge at issue in *FERC v. EPSA*.[14]

This decision will not be the Court's last word this session on state and federal turf lines in electricity markets. *FERC v. EPSA* confirms the shift of expanding FERC authority to suit modern realities. An open question is whether states are given the same leeway: is state activity permitted if it impacts the wholesale market but its purpose is not to impact the wholesale market? The combined cases of *Hughes v. Talen Energy Marketing* and *CPV Maryland, LLC v. Talen Energy Marketing* give the court the opportunity to tackle that issue. The cases stem from efforts by Maryland to encourage energy generation by setting up a program whereby new plants were ensured fixed contract rates and stable revenues from retail electricity purchasers. (The Court also has been asked to review two separate but related cases involving a similar program in New Jersey, but has not yet said whether it will.[15]) These state programs were challenged by existing generating plants that would compete with the new plants in the PJM wholesale market, and, as occurred with *FERC v. EPSA*, the jurisdictional challenge was successful in the lower courts.

The federal appeals courts found that the incentives infringed on FERC's jurisdiction over wholesale rates for electricity and transmission that crosses state lines.[16] In their appeals to the Supreme Court, the states and other parties argue that the lower courts inappropriately hampered the states' ability to ensure adequate and affordable electricity generation and failed to preserve states' authority over electricity generation within their borders.

A Supreme Court victory for the petitioners would recognize that states must be able to pursue their own energy policy agendas—specifically clean energy agendas—in a manner that complements FERC's authority. ❊

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(Endnotes)

1. *FERC v. Electric Power Supply Ass'n*, 577 U.S. ___ (2016).
2. *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 76 Fed. Reg. 16,658 (Mar. 24, 2011), FERC Stats. & Regs. ¶ 31,322 (2011) ("Order No. 745").
3. *FERC v. EPSA*, 577 U.S. at ___ (slip op. at 18).
4. 16 U.S.C. § 791a *et seq*.
5. *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927) (establishing constitutional limits on states regulating interstate energy transactions by concluding that neither Massachusetts nor Rhode Island had the power to regulate an interstate transaction, and stating that "if such regulation is required it can only be attained by the exercise of the power vested in Congress"). *See also New York v. FERC*, 535 U.S. 1, 6 (2002) ("In designing the FPA, Congress authorized federal regulation in areas beyond the reach of state power, such as the gap identified in *Attleboro*, [and] it also extended federal coverage to some areas that previously had been state regulated.").
6. *FERC v. EPSA*, 577 U.S. at ___ (slip op. at 1) (citing 16 U.S.C. §§ 824(b), 824e(a)).
7. *Id.* at ___ (slip op. at 14-17).
8. *Id.* at ___ (slip op. at 17-25).
9. *Id.* at ___ (slip op. at 25-29).
10. *Id.* at ___ (slip op. at 29-33).
11. *Id.* at ___ (slip op. syllabus at 1).
12. *Id.* at ___ (slip op. at 7).
13. *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008).
14. *FERC v. EPSA*, 577 U.S. at ___ (slip op. at 9-10).
15. *CPV Power Holdings, LP v. PPL EnergyPlus, LLC* (No. 14-634); *Fiordaliso v. PPL EnergyPlus, LLC* (No. 14-694).
16. *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *cert. granted* (Oct. 19, 2014); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *pet'ns for cert. filed* (Nov. 26, 2014 and Dec. 10, 2014).

SCC Updates *(continued)*

used by eligible agricultural customer-generators in interconnecting to their utility.

On June 23, 2014, the SCC issued its Order Adopting Regulations after thorough consideration of the comments provided on the Proposed Rules. The SCC's Revised Rules in that agricultural net energy metering rulemaking addressed the 2014 legislative changes to Va. Code § 56-594 and can be summarized as:

> (1) providing a definition of "eligible agricultural customer-generator";
>
> (2) requiring utilities to permit agricultural customer-generators to aggregate loads served by multiple meters, as specified by Chapter 268; and
>
> (3) establishing the required parameters for participation by such agricultural customer-generators in the net energy metering programs offered by investor-owned utilities and electric cooperatives under the Net Energy Metering Rules.

Electric utilities and cooperatives were directed to make compliance filings with the SCC to implement these changes in the Net Energy Metering Rules and to conform their tariff terms and conditions to those Revised Rules, as part of a process completed by the fall of 2015.

2015 Net Energy Metering Rule Amendments

On the heels of the agricultural net energy metering changes, in 2015 the Virginia General Assembly enacted five further amendments to Virginia's Net Energy Metering Statute, Va. Code § 56-594, effective July 1, 2015. First, the capacity limit for participating nonresidential customers was increased from 500 kW to 1 megawatt (MW) for facilities placed into service after July 1, 2015 (but keeping the residential limit at 20 kW). Next, the provision in the statute allowing utilities to increase these capacity limits at their own election was deleted. Third, in addition to the overall limits, the capacity of new facilities was limited to the expected energy consumption based on twelve months (or an annualized twelve months) of billing history. Fourth, electric distribution companies were given a thirty-day period from the date of a residential customer's notification (and sixty days for a nonresidential customer) to review and approve a customer's interconnection request before installation. The fifth change of note was a clarification that it is the net energy metering customer that bears all reasonable costs of equipment required to interconnect to the utility's distribution system.

The SCC instituted a limited rulemaking in Case No. PUE-2015-00057 including issuance of Proposed Rules prepared by Commission Staff on June 5, 2015, with notice of the proceeding and Proposed Rules published in the *Virginia Register of Regulations* on June 29, 2015. The Proposed Rules were strictly limited to conforming the Net Energy Metering Rules to the revisions mandated by Chapters 431 and 432 of the 2015 Acts of Assembly. The Commission allowed for requests for hearing and limited comments only to the subjects addressed in the statutory changes to Va. Code § 56-594. Over twenty interested persons, utilities and organizations filed comments. The proceeding was not to address other updates or policy questions, or general complaints about the existing rules, and the Commission made it clear it would not entertain changes beyond the scope of those needed to conform the Net Energy Metering Rules to the recent legislative enactments. The comments largely stated parties' concerns and positions on the various changes, including the best basis for setting a facility's capacity, the costs to be paid by customers, as well as where parties thought further clarification to the Proposed Rules might be in order to fully align the Rules with the General Assembly's changes. The timeframes for considering interconnection requests also remained controversial.

By the Commission's November 24, 2015 Order Adopting Regulations, a hearing was found unnecessary, and the SCC adopted Revised Rules based on the comments received. The Commission's Revised Rules make clear that a customer seeking to add capacity to a generator must file a new application with its distribution company. The Revised Rules

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also modified the approval process and application form to be submitted to the distribution company by a net energy metering customer, but the Commission declined several other more detailed rule change proposals, noting that its complaint procedure is available, for instance, when a customer believes an application has been denied improperly or that calculations of capacity or usage history have been done incorrectly. Compliance filings from electric utilities were directed for January of 2016, where tariff revisions necessary to implement the new regulations were to be submitted to the SCC.

Fundamentally the changes addressed in the Revised Rules:

(1) increase the capacity limit for participation by nonresidential customers in the net energy metering program from 500 kW to 1 MW (for facilities placed into service after July 1, 2015);

(2) eliminate the authorization for electric utilities to allow a higher capacity limit for nonresidential customers than that set forth in the statute;

(3) require that the capacity of any generating facility installed after July 1, 2015, shall not exceed the expected annual energy consumption based on the previous twelve months of billing history or an annualized calculation of billing history if twelve months of billing history is not available;

(4) require any eligible customer-generator seeking to participate in net energy metering to notify its supplier and receive approval to interconnect prior to installation of an electrical generating facility; and

(5) clarify requirements regarding the customer-generator's obligation to bear the costs of equipment required for the interconnection to the supplier's electric distribution system.

By the issuance of the SCC's Order Adopting Regulations and the subsequent compliance filings by impacted utilities, the new Net Energy Metering Rules are in place and ready for the "road test" provided by an increasing interest and influx of customer net energy metering arrangements. ❉

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(Endnotes)

1. *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex parte, In re: amending regulations governing energy net metering*, Case No. PUE-2014-00003, 2014 S.C.C. Ann. Rept. 366, Order Adopting Regulations (June 23, 2014).

2. *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex parte, In re: amending regulations governing net energy metering*, Case No. PUE-2015-00057, 2015 S.C.C. Ann. Rept. ___, Order Adopting Regulations (Nov. 24, 2015).

3. 20 VAC 5-315-10 *et seq.*

4. 20 VAC 5-315-20.

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 issues 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 "Sections," then "Administrative Law."

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