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Administrative Law News

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FERC Sticks with Regionalizing PJM's High-Voltage Transmission Costs on Remand from the Court of Appeals

By Kenneth A. Barry

The central question in this landmark case, which has traveled from the Federal Energy Regulatory Commission ("FERC" or the "Commission") to the 7th Circuit Court of Appeals and back again in a five-year journey, is how PJM should allocate the costs of new, high-voltage transmission projects planned jointly under its auspices. FERC's latest order,[1] issued on March 30, provides its long-awaited response to the 7th Circuit Court of Appeals' 2009 remand of Opinion No. 494[2] – FERC's April 2007 decision adopting the so-called "postage stamp" rate design[3] as the best way to spread the costs of new, 500 kV (or higher) transmission facilities constructed within PJM.

The court's 2009 remand[4] did not absolutely reject PJM-wide transmission cost equalization in general, or the postage stamp method in particular. However, it did find unpersuasive the rationale FERC's Opinion 494 offered in redirecting PJM from a more tightly focused, local benefits-driven cost allocation method[5] to regional socialization of major project costs. Nonetheless, the 7th Circuit's remand order gave FERC enough leash to either (a) adopt an alternative method (such as the DFAX method) to allocate *all* new facilities; [6] *or* (b) reinforce the reasoning underlying Order 494's directive to uniformly regionalize the costs of high-voltage projects in PJM.

On remand, FERC initiated a "paper hearing" to gather PJM and stakeholder input on whether the postage stamp method could (or should) be salvaged. To save it, the Commission recognized it would

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A Heavier Burden: The Virginia Court Of Appeals Reinforces Obligations On Employers And Carriers In Workers' Compensation Medical Provider Claims

By Mark C. Shuford

Under the provisions of the Virginia's Workers' Compensation Act, specifically Virginia Code § 65.2-603, if the Virginia's Workers' Compensation Commission (the "Commission") enters an award for an injury resulting in an employee's work incapacity, the employer must pay for all "reasonable and necessary treatment" for the injury. Under Code § 65.2-605, "[t]he pecuniary liability of the employer for [such reasonable and necessary] medical, surgical, and hospital service" is "limited to such charges as prevail in the same community for similar treatment when such treatment is paid for by the [employee]." This is commonly known as the "prevailing community rate" standard, or "PCR." The Commission has express statutory authority under Code § 65.2-617 to "order the repayment of the amount of any [physician or hospital] fee which has already been paid [by the employer] that it determines to be excessive." However, in ever increasing numbers, it is physicians or hospitals which are discovering that they have been reimbursed by the employer or its insurance carrier in an amount which is considerably less than the charge which the medical provider submitted for payment. In many such instances, the physician or hospital subsequently files a claim asking the Commission to enter an award ordering the payment of the balance of the medical bill. The Commission has exclusive original jurisdiction over such claims. *Combustion Eng'g v. Lafon*, 22 Va. App. 235, 237-8, 468 S.E.2d 698, 699 (1996).

According to data compiled by the Commission, in the last decade filings of such medical provider applications have increased by more than five hundred percent. Currently medical costs – as distinct from disability compensation – represent approximately two-thirds of the total cost of workers' compensation benefits awarded in Virginia. Hence, in recent years the question of how a medical provider demonstrates, from an evidentiary standpoint, that the charges for medical services rendered by him for treatment of a workers' compensation patient are consistent with the prevailing community rate has taken on increasing significance.

Beginning as early as 1996, the Commission had uniformly held that the medical provider's medical bills themselves, without anything more, were *prima facie* evidence that the provider's charges were reasonable and necessary. *Blevins v. Williamsburg Pottery*, 75 O.W.C. 103 (1996) (citing *Bogle Dev. Co. v, Buie*, 19 Va. App. 370, 375, 451 S.E.2d 682, 685 (1994), *rev'd on other grounds*, 250 Va. 431, 463 S.E.2d 467 (1995)). The Court of Appeals of Virginia decision in

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Commission Approves Conversion of Three Small Coal-fired Generating Facilities into Biomass-fired Renewable Facilities

By Ashley B. Macko

On March 16, 2012, the Virginia State Corporation Commission approved the conversion of three coal-fired generating facilities into biomass-burning facilities and cost recovery associated with the conversions through a rate adjustment clause under Va. Code § 56-585.1 A 6.[1] Significantly, while the conversions would result in a reduction of the net capacity rating of each of the units from 63 megawatts to 51 megawatts, the energy production (capacity factor) of the converted units is expected to significantly increase compared to continued coal operations. Notwithstanding opposition, the Commission determined that the public convenience and necessity would be served by approving the proposed conversions, including a finding that the biomass conversions were "likely to be cost-effective on a net present value basis" which was informed by a number of factors including federal production tax ("PTC") credits, renewable energy certificate revenues, economic value resulting from projected carbon legislation or regulation, projected fuel prices, projected capacity factors for the converted units, and screening curves developed by the Commission Staff.

With respect to the rate adjustment clause, the Commission found that the conversions constituted major unit modifications under Va. Code § 56-585.1 A 6, recognizing that no party had asserted otherwise. Major unit modifications that convert existing facilities to renewable power facilities qualify for a 200 basis point adder to the authorized return on equity that applies during the construction phase of the facilities and the first portion of the service life, a period between five and 15 years at the Commission discretion, taking into account how critical the facility may be in meeting energy need, and the risk involved in the development of the facility. The Commission, consistent with most of its prior determinations on this issue, selected the statutory minimum of five years. The Commission noted that its selected duration was based, in part, on (1) the significant portion of project costs fixed by contract, (2) the modest investment costs as compared to other projects, (3) the generation technology, which is neither new nor experimental in the industry or to the Company, and (4) the use of pre-existing generation sites, with existing and operational infrastructure for generation facilities. Additionally, the Commission did not find that the criticality of the conversions required the first portion of the service life to extend beyond five years.

The Commission determined that that there were no "incremental costs" related to the conversions as that term in defined in Va. Code § 56-585.2 of the Code governing RPS programs. In this regard the Commission found that no incremental costs attendant to these units had been identified and quantified on the current record nor had it been established that the costs the conversions were costs of an RPS program under Va. Code § 56-585.2. Rather, the Commission found the attendant costs were for baseload facilities under Va. Code § 56-585.1 A 6. The significance of this determination relates to whether the costs of the conversion would be allocated to the industrial classes under Va. Code § 56-585.2 which provides that "incremental costs of the RPS program shall not be allocated to or recovered from customers that are served within the large industrial rate classes of the participating utilities and that are served at primary or transmission voltage." Had there been "incremental costs," the Company would not have been able to recover them from the large industrial rate classes.

Finally, the Commission established a sunset provision which requires the Company commence timely commercial operation by December 31, 2013 so as to receive the federal PTC credits.

For additional information, please see Case No. PUE-2011-00073 under the Commission's docket search webpage.

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

(Endnotes)

1. *Application of Virginia Electric and Power Company for approval and certification of the proposed biomass conversions of the Altavista, Hopewell, and Southampton Power Stations under §§ 56-580 D and 56-46.1 of the Code of Virginia and for approval of a rate adjustment clause, designated as Rider B, under Va. Code §56-585.1 A 6 of the Code of Virginia*, Case No. PUE-2011-00073 (Final Order, Mar. 16, 2012).

SCC Upholds the Broad Reach of its Discovery Rules in Integrated Resource Plan Proceeding

By James G. Ritter

On March 19, 2012, the State Corporation Commission resolved a noteworthy discovery dispute in Dominion Virginia Power's ("Dominion's" or the "Company's") Integrated Resource Plan ("IRP") proceeding.[1] The Commission's decision indicates that, like the IRP itself, the scope of discoverable information in an IRP case can be quite broad. Even though construction of and cost recovery for electric utility facilities are outside the scope of what may be approved in an IRP case, information related to those issues is still within the scope of discovery.

Enacted in 2008, § 56-597 of the Code of Virginia defines an IRP as "a document developed by an electric utility that provides a forecast of its load obligations and a plan to meet those obligations by supply side and demand side resources over the ensuing 15 years to promote reasonable prices, reliable service, energy independence, and environmental responsibility." An electric utility must file a new IRP with the Commission at least every two years, and the Commission must determine whether each IRP is "reasonable and . . . in the public interest."[2] Among other things, an IRP should "identify a portfolio of electric generation supply resources, including purchased and self-generated electric power," that will allow the utility to "continue to provide reliable service at reasonable prices over the long term."[3] When it approved Dominion's previous IRP in 2009, the Commission emphasized that an IRP is strictly "a planning document" that is "based on a snapshot in time."[4] The IRP process does not, in other words, involve Commission approval of or commit a utility to any particular future supply-side or demand-side resource or set of resources.

The discovery dispute in Dominion's most recent IRP case centered on interrogatories served on the Company by the Commission Staff (the "Expenditure Interrogatories"). Each of the Expenditure Interrogatories sought detailed information about the cost expenditures, both incurred and projected, for a different supply-side resource identified in the IRP.

Dominion raised a number of objections to the requests, but its principal claim was that the requested information was beyond the scope of the IRP proceeding, because an IRP is used for planning purposes and not for approval to build and recover the costs of any specific resource. The Company suggested that in this type of planning context, the only relevant cost information is "the cost at which a particular resource is modeled and whether that cost is reasonable."

In response, Staff filed motions to compel the Company's responses to the Expenditure Interrogatories.[5] Both Dominion and the Environmental Respondents[6] filed responses to the motions, with Dominion opposing and the Environmental Respondents supporting the Staff position. In its response, the Company explained its objections and stated that it had fully complied with the IRP statutes, the IRP Guidelines,[7] and the order in its previous IRP case, none of which required production of the information requested by the Expenditure Interrogatories.

On March 5, 2012, the Hearing Examiner issued a Ruling recommending that the motions to compel be granted and certifying the disputed discovery issues to the Commission.[8] In the Ruling, the Hearing Examiner found that the Expenditure Interrogatories satisfied the broad discovery relevance standard set forth in Rule 260 of the Commission's Rules of Practice and Procedure.[9] The requests "appear[ed] reasonably calculated to lead to the discovery of admissible evidence" because they sought information "to be used in testing the various inputs and assumptions made by the Company when conducting its comparative cost analysis" provided in the IRP. The Hearing Examiner also rejected the Company's argument that the Code provisions governing IRP proceedings limit the type of information that can be obtained through discovery in an IRP case. Although subsections (1) through (3) of § 56-598 prescribe the specific types of information that should be included in an IRP, subsection (4) provides a "catch-all" that "vest[s] the Commission with discretion to determine what additional information . . . should be included within the actual IRPs that are submitted to the Commission for approval."[10]

As requested by the Company, the Hearing Examiner certified the dispute to the Commission, "in recognition of the broad and unique scope of IRP proceedings and the potential burden to be imposed upon the Company if it is required to respond." After conducting oral arguments, the Commission issued an order granting the motions to compel consistent with the Hearing Examiner's ruling. It emphasized, however, that "the reasonableness and prudence of any actual or projected expenditures toward one or more specific demand- or supply-side resource option is not an issue in an IRP proceeding." It also noted that, as the various participants discussed during oral argument, a decision on the discoverability of information under Rule 260 is not the same as a ruling on the admissibility of that information. Finally, the Commission reiterated that any determination that an IRP is reasonable and in the public interest "in no manner

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FERC Asserts Jurisdiction over Bundled Renewable Energy Certificates

By Ashley B. Macko

On April 20, 2012, the Federal Energy Regulatory Commission ("the Commission") issued an order wherein it confirmed it had no jurisdiction under the Federal Power Act with respect to the sale of unbundled state-issued renewable energy certificates ("RECs"), but asserted jurisdiction if the REC sale is bundled with a wholesale energy sale.[1] The Commission reasoned that "RECs are state-created and state-issued instruments certifying that electric energy was generated pursuant to certain requirements and standards. Thus, a REC does not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce."[2] With respect to a bundled transaction, however, "where a wholesale energy sale and a REC sale take place as part of the same transaction, RECs are charges in connection with a jurisdictional service that affect the rates for wholesale energy."[3] The Commission concluded under such a situation, "the Commission has jurisdiction over the wholesale energy portion of the transaction as well as the RECs portion of a bundled REC transaction under FPA sections 205 and 206 (regardless of whether the contract price is allocated separately between the energy and RECs)." [4] The Commission further noted that parties would not avoid Commission jurisdiction by simply separating a bundled REC transaction so that the sale of energy and the REC sale are included in separate documents.[5] "Contract interpretation rules permit that where multiple instruments, executed contemporaneously or at different time, pertain to the same transaction, they will be read together, even if they do not expressly refer to each other."[6] ❇

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

(Endnotes)

1. *WSPP Inc.*, 139 FERC ¶ 61,061, P 18 (2012).
2. *Id.* at P 21.
3. *Id.* at P. 24.
4. *Id.*
5. *Id.* at P. 26.
6. *Id.*

Commission Establishes Rulemaking on Rate Case Rules

By Ashley B. Macko

On May 10, 2012, the Commission established a rulemaking docket to consider potential revisions to the Rate Case Rules, 20 VAC 5-201-10 *et seq.*, in light of actual experience implementing the Regulation Act, Chapter 23 of Title 56 of the Code of Virginia. The Commission cited the experience gained from the "going-in" rate cases and 2011 biennial reviews for both Dominion Virginia Power and Appalachian Power Company which occurred following the most recent revisions to the Rate Case Rules in 2008. The Commission limited the scope of the proceeding to Rate Case Rules "applicable to rate proceedings conducted under the Regulation Act." The Commission explained that it would both seek and consider comments on matters regarding potential revisions and then determine whether to propose specific revisions to the Rate Case Rules for further notice and comment. The Commission set out two questions on which it seeks comment:

(1) Do any of the Schedules required to be filed in Biennial Review and RAC proceedings need to be revised or deleted or are new Schedules necessary? If so, explain in detail why such changes are necessary and include a sample format.
(2) Are there potential revisions to the Rate Case Rules applicable to rate proceedings conducted under the Regulation Act that the Commission should consider?

The Commission requested written comments by July 6, 2012.

For additional information, see Case No. PUE-2012-00043 under the State Corporation Commission's docket search webpage. ❇

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

Commission Establishes Rulemaking on Performance Incentives

By Ashley B. Macko

On March 5, 2012, the Commission established a rulemaking to develop specific performance metrics and nationally recognized standards the Commission should consider when determining whether a positive or negative performance incentive should be applied, as authorized by Va. Code § 56-585.1 A 2 c of the Code, which was enacted as part of the 2007 Regulation Act.

The Commission directed its Staff to solicit comments from stakeholders and established a date of September 5, 2012, for filing the Staff's proposed rules and regulations. Further, the Commission directed that "[w]e expect our Staff to develop, with appropriate input from stakeholders and other interested persons, the specific performance metrics and nationally recognized standards that would be filed when an investor-owned incumbent electric utility requests, or when a party supports an increase or decrease in such utility's authorized return on equity under § 56-585.1 A 2 c of the Code." When developing the proposed rules, the Commission provided additional guidance that:

> a mechanical, formulaic approach which limits the Commission's discretion when considering a positive or negative Performance Incentive should not be included in the proposed rules. In other words, when the specific performance metrics and nationally recognized standard are proposed, a utility's ability to meet or fail to meet a specific performance metric or nationally recognized standard should not automatically result in a specific basis point increase or decrease in an investor-owned incumbent electric utility's authorized return on equity. Rather, we expect the proposed rules and regulations to preserve the Commission's discretion to award a positive or negative Performance Incentive depending on the evidence presented in each case.

For additional information, see Case No. PUE-2012-00021 under the Commission's Docket Search webpage. ❇

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

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."

Commission Approves Dominion's Phase II DSM Programs

By Ashley B. Macko

On April 30, 2012, the Commission approved four out of six of Dominion Virginia Power's proposed Phase II demand-side management ("DSM") programs.[1] The Commission approved a five-year Residential Bundle Program consisting of four programs: the Residential Home Energy Check-Up Program, the Residential Duct Testing & Sealing Program, the Residential Heat Pump Tune-Up Program and the Residential Heat Pump Upgrade Program. The Commission also approved a Commercial Bundle Program consisting of the Commercial Energy Audit Program and the Commercial Duct Testing & Sealing Program. Finally, the Commission approved the Commercial Distributed Generation Program as a peak-shaving program as opposed to an energy efficiency program as proposed by the Company.

The Commission began its analysis by discussing the public interest-focused aspect of its evaluation. In approving the programs, the Commission explained that it had considered all four of the industry-standard cost-benefit tests, as well as other relevant factors. The Commission found "the impact on customers' bills, especially the impact on the bills of customers not participating in these programs, is a relevant factor in our determination of the public interest."[2] The Commission further explained that "the program's impact on customer rates in both the near and long term is particularly relevant in our evaluation of the public interest." [3]

In light of the foregoing standards, the Commission established cost caps for the approved programs and authorized them for a period of five years. With respect to the Company's proposal to recover projected lost revenues resulting from the approved and proposed Programs, the Commission found the proposal neither reasonable nor in the public interest and directed that "Dominion must prove in subsequent cases that it incurred 'revenue reductions related to energy efficiency programs' before recovery of lost revenues will be permitted."[4] The Commission established a five-year cost cap on $90 million for the Residential Bundle Program and a five year cost cap of $45 million for the Commercial Bundle and further directed that these cost caps include "all potential costs of the programs – including but not limited to operating costs, lost revenues, common costs, return on capital expenditures, margins on O&M, and evaluation, measurement and verification costs."[5]

In approving the Commercial Distributed Generation Program as a peak-shaving Program, the Commission opined that this program is not an energy efficiency program designed to reduce required electricity, but a program that is used to help meet, as opposed to lower, overall demand.[6]

The Commission directed the Company to propose one or more alternative class allocation methodologies and to address the rationale and ramifications of the proposed methodology when it files for approval of new energy efficiency or peak-shaving programs.[7] The Commission approved the Company's proposal to move from filing an evaluation, measurement and verification report twice per year to an annual filing.[8] The Commission also addressed the impact of Va. Code § 56-585.1 A 3 on the Company's existing Riders C1 and C2.

For additional information, search Case No. PUE-2011-00092 under the Commission's docket search page. ❇

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

(Endnotes)

1. *Application of Virginia Electric and Power Company, For approval to implement new demand-side management programs and for approval of two updated rate adjustment clauses pursuant to § 56-585.1 A 5 of the Code of Virginia*, Case No. PUE-2011-00093 (Order, Apr. 30, 2012).
2. *Id.* at 7.
3. *Id.* at 9.
4. *Id.* at 10.
5. *Id.* at 9-12.
6. *Id.* at 13.
7. *Id.* at 14.
8. *Id.*

Commission Approves Appalachian Power Company's Proposed Demand Response Programs under 2009 Legislation

By Ashley B. Macko

On September 12, 2011, the Commission approved two voluntary demand response ("DR") riders proposed by Appalachian Power Company: a peak shaving demand response rider and a peak shaving and emergency demand response rider.[1] Appalachian asserted that the proposed riders would help reduce its annual peak resulting in a lower capacity equalization obligation to other AEP-East operating companies under the AEP Interconnection Agreement, thereby benefitting both participants and non-participants. The application was brought under legislation passed by the 2009 Virginia General Assembly which provides that the Commission:

> *for the service area of a generating electric utility that has elected to meet its capacity obligations of a regional transmission entity through a fixed capacity resource requirement as an alternative to other capacity mechanisms, shall approve any demand response program proposed to be offered to retail customers by the generating electric utility or any other qualified nonutility provider if, following notice and the opportunity for a hearing, the State Corporation Commission finds (i) any nonutility provider to be qualified, (ii) the program to be effective, reliable, and verifiable as a capacity resource, and (iii) such program to be in the public interest.*[2]

The Commission approved the DR riders subject to a number of conditions, noting that the Company had not sought to defer carrying costs associated with the riders and that no such carrying costs were being approved. Appalachian had sought permission to defer the DR rider-related costs until cost recovery is addressed through a future proceeding. Commission Staff had recommended that the Commission's approval be predicated on the Company's willingness to not recover program-related costs from non-participants until such time as the Company could affirmatively show that the non-participants would, in fact, receive some benefits from the DR riders. Ultimately, the Commission approved cost deferral "to the extent permitted by statute" and subject to offset by any non-compliance payments received by the Company from participating customers. The Commission further noted "the Commission's approval granted herein shall have no ratemaking implications. In particular, the Commission's approval shall not guarantee recovery of any costs directly or indirectly related to the DR Riders." The Commission also established a number of reporting requirements.

For additional information, see Case No. PUE-2011-00001 under the Commission's docket search webpage. ❊

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

(Endnotes)

1. *Application of Appalachian Power Company pursuant to Chapters 752 and 855 of the 2009 Acts of the Virginia Assembly, for approval of demand response programs to be offered to its retail customers*, Case No. PUE-2011-00001 (Final Order, Sept. 12, 2011).

2. 2009 Va. Acts of Assembly, Ch. 752, 855.

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have to address these explicit concerns of the 7th Circuit:

- That FERC had not supported its conclusion that the *existing* methodology for allocating high-voltage project costs was "unjust and unreasonable;"
- That it had not provided a convincing rationale for concluding that the same DFAX methodology approved for allocating lower-voltage projects was too unwieldy to apply to 500 kV-plus projects;
- That the postage stamp method appeared to disregard a fundamental axiom of ratemaking: that "All approved rates [must] reflect to some degree the costs actually caused by the customers who must pay them."

In the "paper hearing," camps either endorsing or opposing the policies of Opinion 494 weighed in.[7] After briefly summarizing those comments, FERC began to divulge its own views. It quickly became apparent it was convinced that its original judgment was sound, as it expounded at length on why the postage stamp method is the superior approach in

PJM's High-Voltage *(continued)*

apportioning the costs of large-scale projects to ratepayers.

FERC's main points in defense of the postage stamp cost allocation for 500 kV-plus projects can be summed up as follows:

- *"Snapshot" nature of DFAX allocations unsuited to assessing causation or long-term benefits of larger projects.* Large, high-voltage projects simply do not lend themselves to the localizing DFAX method of cost allocation, FERC contended. The DFAX analysis can only capture system conditions and flow projections that drive a particular upgrade at a moment in time – a snapshot – which is not a handicap in allocating the costs of more localized (sub-500 kV) projects. However, FERC sees it as a major problem in apportioning the costs of larger projects that are designed to transfer energy over great distances at high voltages. This is because planning assumptions about regional flows, generation sources, loads, demand response, *etc.,* shift over the long lives of transmission projects. The "static" nature of the DFAX analysis, FERC posits, is a mismatch with the dynamic and unpredictable nature of region-wide system demands over decades, since the traceable benefits individual PJM load zones derive from any "backbone" project fluctuate over the long haul. Therefore, a less specific, less targeted approach to allocating such expansion costs -- in a nutshell, the postage stamp rate design -- is the fair way to share the cost burden.[8]

- *Reliability and other "hard to quantify" benefits are best allocated broadly.* In addition to the limitations of the DFAX analysis when applied to long-lived, high-voltage transmission assets, FERC asserted that the postage stamp method's load-weighted, PJM-wide allocation is the best way to assign the costs of maintaining and improving the system's general robustness and resiliency, which provide widespread customer benefits.[9] Moreover, high-voltage projects typically remedy *multiple* potential NERC violations over an extensive geographical area. FERC paired these points with the additional planning consideration that the PJM grid is being reconfigured to deliver "public policy" benefits beyond either conventional reliability or "economic efficiency" upgrades,[10] again arguing for a far-reaching, regional approach to allocating the attendant costs.

- *Choosing the "just and reasonable" allocation method for high-voltage transmission upgrades.* FERC concluded that (1) "the static DFAX misaligns the costs and benefits" of 500 kV-plus facilities and is an "unjust and unreasonable" way to allocate their costs, while (2) postage-stamp rate design regionalizing such costs *is* "just and reasonable." Anticipating further judicial appeals, FERC spent many pages marginalizing the misgivings expressed by the 7th Circuit in the *Illinois Commerce Commission* decision. Its bottom line was that neither the *ICC* case nor the precedents the 7th Circuit cited require FERC to find a balance of costs and benefits for "each customer (or party or utility zone)." FERC went on to lecture on the efficiencies of region-wide planning and coordination and touted estimates that the annual dollar benefits from RTO participation reaped by the western PJM Transmission Owners opposing the postage stamp allocation greatly exceed their allocated share of the new, high-voltage projects. Finally, the Commission offered a technical analysis implying that 500 kV-plus facilities function differently from 345 kV and below lines, making it reasonable to employ voltage-differentiated allocation methods.

Given that FERC's March 30 remand decision went against the grain of the 7th Circuit's remand order, it would have been helpful to FERC's cause if the Commissioners presented a solid front. However, that was not the case. While Commissioner LaFleur agreed that the majority had demonstrated that the DFAX method *alone* is an insufficiently flexible way to allocate new, high-voltage grid costs over a long period, she noted that DFAX has been successfully used by PJM to determine what entities are initially "causing" major upgrades. She deemed the majority's total embrace of the postage stamp method "overbroad" and endorsed, instead, a "hybrid" approach. This crack in FERC's front may add hope to litigants wishing once again to challenge the postage stamp allocation as an affront to the cardinal ratemaking principle that costs must follow causation. ❊

About the Author: Kenneth A. Barry is a long-time energy attorney who practiced in-house for a Richmond-based industrial consumer, Reynolds Metals, for over twenty years. From 2000, he was Counsel with Hunton & Williams' Washington, D.C. office, working primarily on behalf of independent transmission entities as well as advising in various FERC and state electric and gas regulatory matters. Since 2006, he has assisted a major law firm in advising clients on FERC developments in a consulting capacity. He is a member of the Virginia, D.C., and New York bars, and lives in Northern Virginia.

PJM's High-Voltage *(continued)*

(Endnotes)

1. *PJM Interconnection LLC,* Doc. No. EL05-121, 138 FERC ¶61,230 (March 30, 2012).
2. *See* Opinion No. 494, 119 FERC ¶61,063 (2007), *order on reh'g,* Opinion No. 494-A,122 FERC ¶61,032 (2008),
3. This is a regional cost-equalization approach that assumes new transmission facilities meeting the 500 kV voltage threshold are beneficial to *all* load within the RTO and therefore may be allocated on an RTO-wide load-ratio basis. Hence all PJM loads contribute *pro rata* to the costs of any new transmission facility meeting the voltage threshold.
4. *Illinois Commerce Commission v. FERC,* 576 F. 3rd 470 (7th Cir. 2009).
5. This methodology is known as "DFAX." By calculating "distribution factors," DFAX tracks the sources of flows that contribute to a constraint (and potential NERC reliability violations), so that the costs of upgrades to address those potential violations may be allocated to the appropriate "cost causers."
6. FERC in fact approved this methodology in Order 494 to be used on an ongoing basis to allocate the costs of *sub*-500 kV facilities.
7. Some parties on the western flanks of PJM were up in arms against FERC's allocation because the bulk of the *new,* high-voltage facilities subject to it were being built in the eastern half of PJM. Since flows in PJM are mainly west-to-east, they saw western loads as bearing a disproportionate share of the costs compared to their benefits.
8. FERC also praised the postage stamp approach because it reallocates costs annually, based on load ratio shifts. Thus, if one area can manage its peak better, its contribution to system peak and hence its allocated share of high-voltage transmission costs declines, relative to other areas.
9. In this regard, FERC stressed how high-voltage projects enable the grid to withstand cascading outages over wide areas, such as the August 2003 incident that impacted much of the Midwest and Northeast but stopped at PJM.
10. Here, FERC has in mind regional upgrades to handle the delivery of remotely located renewable energy, often in response

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Bogle (later reversed by the Supreme Court of Virginia based upon a lack of jurisdiction) stated, "[T]he Supreme Court of Virginia has held that medical bills received by an injured party are *prima facie* evidence that the charges were reasonable and necessary." *Bogle* at 19 Va. App. at 375, 451 S.E.2d at 685 (citing *Walters v. Littleton*, 223 Va. 446, 290 S.E.2d 839 (1982)). In this context, if the charges were determined to be "reasonable," they were deemed *per se* to have been consistent with the PCR.

In *Walters v. Littleton*, *supra*, the Supreme Court of Virginia held that, "[w]ith the proviso that a proper foundation must precede introduction of the bills, we agree with the reasoning of those courts which have held that evidence presented by bills regular on their face of the amounts charged for medical service is itself some evidence that the charges were reasonable and necessary." *Id.* at 452, 290 S.E.2d at 842. Eventually, the Commission took this standard a step further, and held not only that the provider's medical bills constituted *prima facie* evidence that the provider's charges were reasonable, but also that the employer bore the burden of proving that the charges exceeded the prevailing community rate. *See, e.g., Alger v. A A & T, Inc.*, VWC No. 176-50-77 (August 30, 2001). In 2011, however, the Commission provided significant clarification of what had long been the understanding of both counsel and deputy commissioners as to what was meant by the rule that the provider's medical bills constituted *prima facie* evidence that the provider's charges were reasonable. In the case of *Curro v. Fairfax (County of) Police*, VWC No. 224-97-52 (November 9, 2011), the Commission reviewed the series of cases from which the "*prima facie* evidence rule" had developed, and reaffirmed its position that "the medical bills received by the claimant here are indeed *prima facie* evidence that the charges were reasonable." However, the Commission went on to point out that none of the case law on this issue, nor any of the Commission's own precedents, had "established any *presumption* which flowed from the introduction of medical bills…." (Emphasis supplied.) The Commission went on to conclude that "we do not believe it accurate to consider the bills as creating a presumption that the charges are reasonable. Thus, the medical bills will be considered and weighed with the other relevant evidence in the case." In the wake of *Curro*, then, there was no longer any presumption that a physician's charges were consistent with the PCR.

The Commission's opinion in *Curro* appeared to some to be a dramatic departure from long-established precedent, while to others it seemed an overdue clarification of what was actually meant by the notion of a party having made a "*prima facie* case." As subsequently noted by Deputy Commissioner Cabell Mercer,

> The Virginia courts often have used the term *prima facie* case to be the functional equivalent of a "rebuttable presumption thereby shifting the burden of producing evidence to the defendant." Friend, *The Law of Evidence in Virginia*, 2nd Ed., § 82. On the other hand, a *prima facie* case may create no more than a permissible inference, which the fact finder may accept or reject, even in the absence of any other evidence. *Friend*, *supra*, § 92. *Curro* appears to use the term in the latter sense.

Johnson v. FedEx Freight East, Inc., JCN 2382155 (May 3, 2012). The consternation created among medical providers and their counsel in the wake of *Curro* was quickly dispelled, however, by the Virginia Court of Appeals just this spring, in its opinion issued in *Ceres Marine Terminals v. Armstrong*,

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59 Va. App. 694, 722 S.E.2d 301 (2012). In *Ceres*, the court once again addressed the issue of whether – once the medical bills themselves are introduced into evidence – the medical provider bears the burden of proving his charges were consistent with the PCR, or conversely whether it is the employer/carrier who bears the burden of proving the charges were excessive. The court unambiguously resolved this question in favor of the medical provider. In answering the question, the court effectively limited its review to the text of the Worker's Compensation Act itself. Upon consideration of the relevant statutory provisions, and what the court described as the Act's "well-known humanitarian purpose," the court concluded not only that it is proper for the Commission to consider the medical bills, alone, to be *prima facie* evidence that the provider's charges are consistent with the Act, but also that it was proper to place the burden of proving the medical fee was excessive on the employer. *Ceres*, 59 Va. App. at 703, 722 S.E.2d at 306. The court cited two reasons for its conclusion. First, that "a contrary rule would unfairly burden the medical provider and create a significant obstacle to the [employee's] receipt of the reasonable and necessary treatment he is entitled to under the Act." Second, the court found that "a contrary rule would place an excessive burden on the commission."

Just as importantly, the court also held that the issue to be determined in a case where the provider is seeking additional reimbursement is *not* the rate at which medical providers in the same community are *reimbursed* for the same medical service. Rather, the sole issue is: "what would a surgeon and his assistant with the skill and experience of those that operated on [the employee] typically *charge* for the surgery performed on [the employee] at the time and in the community that the surgery was performed." *Id.*, at 707 (emphasis supplied). Hence, an employer or carrier must do more than focus on the charges by, and payments to, the individual provider whose charges are at issue in the claim. It must offer some other evidence of what the charges are in the same community for similar treatment. *Id.*

In the wake of *Ceres*, counsel for employers and insurance carriers are once again left struggling with the dilemma of how to go about proving just what the prevailing charge is in any Virginia community for particular medical services and procedures. Information as to average reimbursement rates has been readily available from a variety of sources for many years, but data as to actual medical provider charges is not as routinely gathered, nor accessed. As a consequence, the ruling in *Ceres* will likely make an already difficult task for defense counsel even more burdensome. ❇

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SCC Upholds *(continued)*

represents – and should not be characterized as representing – explicit or implicit approval for construction or cost recovery of any specific resource option contained in the IRP." ❇

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(Endnotes)

1. *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to § 56-597 et seq.*, Case No. PUE-2011-00092, Order on Certified Question (Mar. 19, 2012).

2. Va. Code § 56-599(C), (E).

3. *Id.* § 56-598(2)(a).

4. *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUE-2009-00096, 2010 S.C.C. Ann. Rept. 385, 387, Final Order (Aug. 6, 2010).

5. Staff filed two motions to compel because the Expenditure Interrogatories were served through two separate sets of discovery requests.

6. The Environmental Respondents included the Chesapeake Climate Action Network, Appalachian Voices, and the Virginia Chapter of the Sierra Club.

7. The IRP Guidelines were established by order of the Commission in 2008. They are not part of the Virginia Administrative Code. *See Commonwealth of Virginia, ex rel. State Corporation Commission, Concerning Electric Utility Integrated Resource Planning Pursuant to §§ 56-597 et seq. of the Code of Virginia*, Case No. PUE-2008-00099, 2008 S.C.C. Ann. Rept. 606, Order Establishing Guidelines for Developing Integrated Resource Plans (Dec. 23, 2008).

8. *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to § 56-597 et seq.*, Case No. PUE-2011-00092, Hearing Examiner's Ruling and Certification to the Commission (Mar. 5, 2012).

9. 5 VAC 5-20-260.

10. Subsection (4) provides that an IRP should "[i]nclude such additional information as the Commission requests pertaining to how the electric utility intends to meet its obligation to provide electric generation service for use by its retail customers over the planning period."

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