THE ADMINISTRATIVE LAW SECTION OF THE VIRGINIA STATE BAR WWW.VSB.ORG/SECTIONS/AD/INDEX.HTM

Administrative Law News

VOLUME XV, ISSUE 12 SUMMER 2013

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When Must a Person Appealing an Administrative Agency Regulation under the Administrative Process Act File the Notice of Appeal in Order to Appeal Timely?

By Norman H. Lamson

Virginia's Administrative Process Act, Ch. 40, Title 2.2, of the Code of Virginia, includes § 2.2-4026 which states:

> Any person affected by and claiming the unlawfulness of any regulation, … shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court

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PJM's Implementation of FERC Order 1000 Passes Its First Milestone

By Kenneth A. Barry

Although the term "transformative" may be a bit overused, few would debate its applicability to Order No. 1000, the Federal Energy Regulatory Commission's (FERC's) most recent effort to revamp transmission planning. Coming on the heels of Order No. 890 (issued in 2007) -- which stepped up coordination of transmission planning among stakeholders and neighboring utilities as part of a general overhaul of the OATT[1] -- Order 1000, issued in the summer of 2011,[2] took things up another notch. Its signature elements were: (1) formalizing the obligation of all transmission-owning utilities to craft a "regional transmission plan" through a transparent and open

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ABOUT THE EDITOR Ashley B. Macko is Counsel in the Regulatory Compliance 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.

Appalachian School of Law to Host the Governor's First Biennial Natural Resources and Energy Law Symposium

By Daniel H. Caldwell

On September 23, 2013 the Appalachian School of Law will host the Governor's First Biennial Natural Resources and Energy Law Symposium in Abingdon, Virginia. To be held at the Southwest Virginia Higher Education Center, this first-of-its kind Symposium will bring together representatives from the energy industry, the environmental community, academia and government for rational debate and civil discourse about legal barriers and legal solutions to the nation's pressing energy problems.

The keynote address on "The Future of Energy" will be delivered by James W. McGlothlin, Chairman and CEO of the United Company, Bristol, Virginia. Six panels of national and international distinguished speakers will discuss topics ranging from EPA Air Regulations to The Effect of Wall Street Reforms on Energy Markets.

State Corporation Commissioner Judith Williams Jagdmann and Virginia House of Delegates Member Terry Kilgore will serve as moderators of the National Energy Policy and Legislative Update panels respectively. And the government contingent includes panelists Jill E. Sommers who serves as a Commissioner on the Commodity Futures Trading Commission, Russ Behnam, a staffer on the U.S. Senate Agriculture Committee (for Senator Stabenow), and David K. Paylor, Director of the Virginia Department of Environmental Quality.

Former Congressman Rick Boucher, now a partner with the national law firm Sidley Austin, will give his perspective based on his 27 years of service in the U.S. Congress to the panel discussion regarding EPA Air Regulations and Their Impact upon Fossil Fuel Based Power Plants and the Environment. EPA Administrator Shawn Garvin (Region 3) has been invited to speak on this panel and will attend or send his representative.

A special panel will discuss the BP Deepwater Horizon Oil Spill. This timely panel will include the Hon. Luther Strange, Attorney General of Alabama, and Mike Underhill, Department of Justice, U.S. Attorney from San Francisco. Attorney General Strange is Liaison Counsel for the Gulf States and Mr. Underhill is presenting the federal government's case against BP in a trial which is currently underway in New Orleans. This panel will be moderated by Virginia Beach attorney Jeffrey Breit who represents plaintiffs in the case and serves on the Plaintiff's Steering Committee.

Cadwalader, Wickersham & Taft attorney Athena Eastwood will moderate a discussion on The Impact of Wall Street Reforms on Energy Markets, a topic that should be of interest to any energy company that enters into supply contracts that contain flexible supply arrangements or that

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Administrative Law News

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Commission Approves Vegetation Management Pilot Program, Deferral of Costs

By Ashley B. Macko

On February 21, 2013, the State Corporation Commission of Virginia ("Commission") approved Appalachian Power Company's ("Appalachian" or the "Company")) application for approval of a cycle-based vegetation management pilot program. In its Final Oder in the Appalachian's 2011 Biennial Review, the Commission directed the Company to develop a four-year cycle-based vegetation management pilot program to determine the cost-effectiveness of implementing such a program on a system-wide basis. In addition to approval of the pilot program, Appalachian also requested authority to defer the costs of the pilot, approximately $30 million over three years, for recovery in its next biennial review. Of the $30 million, $21 million would be expenditures typically classified as operations and maintenance ("O&M") costs. In his November 8, 2012 Report, the Hearing Examiner recommended approval of the Pilot and found that Appalachian would not be able to recover its just and reasonable expenses from ratepayers if the pilot was funded by existing rates.

In its Order on Application, the Commission approved the pilot, with a budget not to exceed $30 million, and authorized deferral of the pilot O&M expenses until further Commission Order stating that "the recovery of deferred Pilot O&M expenses will be dependent upon the results of an earnings test." Further,

> An earnings test performed during a biennial review, applicable to deferred costs, presents at least two significant issues. The first issue is where within the return on equity range (collar) identified in § 56-585.1 A 2 g of the Code of Virginia is it appropriate for testing deferred costs recovery. The second issue is whether the earnings test is based on the operating results of the year the deferral was recorded or the results of the combined two years of the biennial review.

The Commission directed Staff and the Company to address these issues and other relevant issues in the Company's 2013 biennial review and invited other participants to address these issues.

For more information, see *Application of Appalachian Power Company for approval of a cycle-based vegetation management pilot program*, Case No. PUE-2012-00069 (Order on Application, Feb. 21, 2013), available through the Commission docket search portal. ❊

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

Note from the Editor: New Newsletter Editor Coming this Fall

The torch has been passed. After six years of editing the *Administrative Law News* (and 12 editions), I have decided to pass on the privilege of editing this fine newsletter. James ("Jamie") G. Ritter, an associate with Christian & Barton, L.L.P. has accepted the position for 2013-2014. I am pleased to have accepted the position of Secretary of the Board of Governors for the Administrative Law Section for 2013-2014. It has been a privilege to work with so many generous and knowledgeable authors over the past six years and I want to thank each and every one of them for their contributions and encourage all of our membership to submit articles to Jamie for publication. Our newsletter is as good as we make it.

Dominion Receives Approval to Continue Two Demand-Side Management Programs

By Kiva Bland Pierce

On April 19, 2013, the Virginia State Corporation Commission ("Commission") approved Virginia Electric and Power Company d/b/a Dominion Virginia Power's ("Dominion") request to extend two of its demand-side management ("DSM") programs, the Air Conditioning Cycling ("AC Cycling") Program and the Low Income Program. Both programs were set to expire on April 30, 2013.

In its annual request to update its rider adjustment clauses associated with the DSM programs, Dominion sought to extend the Low Income Program for two years and the AC Cycling Program for five years. The Commission approved the programs for a period of two and three years, respectively. The extension of the two programs was approved under the Commission's Cost/Benefit Rules and Promotional Allowances Rules, as requested by Dominion, and not under a rate adjustment clause pursuant to § 56-585.1 A 5. Additionally, costs associated with the extension of the two programs will be dealt with in Dominion's biennial review cases.

As part of its application, Dominion requested that the Commission approve a process where the Commission Staff could approve limited modifications to the design of previously approved DSM programs. The Staff expressed numerous concerns with the proposal, and the Commission denied Dominion's request.

During the proceeding, the Environmental Respondents proposed that the Commission initiate a new proceeding to address rules governing lost revenues related to energy efficiency programs. Dominion supported this request; however, the Commission found such a new proceeding was not necessary given the fact specific nature of determining lost revenues to specific programs.

The requested updated rate adjustment clauses were approved. The total annual revenue requirement approved was $26.6 million. Dominion is required to file its next annual update to these rate adjustment clauses by September 1.

Petition of Virginia Electric and Power Company for approval to extend two 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, SCC Case No. PUE-2012-00100 (Order, Apr. 19, 2013). ❇

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Are unemployment insurance benefits and Social Security disability benefits incompatible?

By David J. Agatstein

Are unemployment insurance benefits and Social Security disability benefits incompatible? Section 303 of the Social Security Act, which sets out the basic requirements for state unemployment insurance laws, requires that a UI applicant be "able to work, available for work and actively seeking work".[1] Section 216 of the Social Security Act authorizes the payment of disability benefits to persons who are terminally ill or who, by reason of their impairments, are unable to engage in "substantial gainful activity" for twelve consecutive months.[2] In a case arising under Virginia law[3], a Social Security ALJ held, and a Magistrate Judge agreed, that a claimant "would not be eligible for disability benefits during any time he was, in fact, receiving unemployment benefits because, in order to receive such benefits, an individual must hold himself out as willing and *able* to work." That is not correct. The key to reconciliation of the provisions is found in the words "substantial gainful activity" (SGA).

The Social Security disability regulations acknowledge that work activity "is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized"[4], but as a practical matter, and for ease and consistency of administration, the agency's primary consideration "will be the earnings you derive from work activity".[5] Earnings in excess of a specified dollar amount are usually considered to be SGA; earnings below that amount are not. In 2013, the cut off is $1,040 per month.[6]

A claimant can work below SGA and receive disability benefits at the same time. In addition, a disability[7] recipient can work above SGA (i.e., full time at full salary) and receive full disability benefits for intermittent periods of up to six months – the "Unsuccessful Work Attempt" (UWA)[8] – and, after one year of disability, for an additional period of nine full months – the "Trial Work Period" (TWP)[9]. These provisions are intended to encourage disabled people to return to work. However, it is not always easy for a disability recipient to find and keep a job.[10] To do so he or she must be ready, willing and able to work.

A disability claimant can also receive *retroactive* benefits for up to one year prior to the filing of a claim.[11] In determining the period of prior disability, the agency applies the SGA, UWA and TWP rules just mentioned. When applied retroactively, it is more difficult to justify these rules as a work incentive.

State Unemployment Insurance Laws differ in detail but all conform to the federal requirement that a claimant be "able and available" for work[12]. Depending upon labor market conditions,[13] state agencies may be more or less aggressive in enforcing the work search requirements of the law, but tend to tread lightly[14] around the provision that a claimant be "able" to work. If a claimant is willing to work, and is actively and sincerely looking for a job, the agency may be hesitant to deny benefits on the grounds that the claimant is mentally or physically deficient.[15] The issue arises most often in response to an employer protest (an employer's unemployment insurance taxes can be affected by the amount of benefits paid[16]) or where the UI claimant is receiving, or has applied for, Worker's Compensation Benefits, State Disability benefits, or benefits under a private insurance plan.[17] Because an employment security agency usually lacks both the authority and the personnel to conduct an independent medical examination of a claimant who alleges that he or she is *capable* of employment, it will sometimes address the problem by deciding that a claimant is "able" to work, but will take into account the receipt of disability benefits in deciding whether the claimant is "available" for employment and looking for a job.[18]

For the reasons already mentioned (SGA, UWA, TWP) a claimant's receipt of Social Security disability benefits does not necessarily mean that the claimant is unable to work. Using unemployment insurance parlance, a Social Security disability recipient need not be "totally unemployed"[19] at any time. Indeed, a disability claimant may be ineligible for UI benefits, not because of inability to work, but because he or she is working!

Similarly, Social Security has determined that the receipt of UI benefits does not necessarily bar a claim for disability benefits. An "Adjudication Tip"[20] propounded by the agency asks the relevant questions: "Has the claimant looked for jobs with physical demands beyond his alleged limitations during the alleged period of disability? Has the claimant performed various mental and physical activities in order to continue receiving unemployment benefits, such as going on interviews, filling out applications, etc.? These activities may also be relevant when evaluating the credibility of the claimant's allegations."

In short, the receipt of UI benefits is but one factor to consider in determining whether a claimant is entitled to Social Security disability benefits, and vice versa. *How* one

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of Virginia.

Va. Supreme Court Rule 2A:2(a) states:

> Any party appealing from a regulation… shall file with the agency secretary, within 30 days after adoption of the regulation…, a notice of appeal signed by the appealing party or that party's counsel.

In *Russell v. Virginia Bd. of Agriculture*, 59 Va.App. 86, 717 S.E.2d 413 (2011), wherein the author of this article represented Russell, a panel of the Court of Appeals held he filed the notice of appeal to a regulation untimely, that is, filed it late.

It would unduly tax the reader's attention to elaborate on the arguments as to why undersigned filed timely. The purpose of this article is to demonstrate the difficulties that counsel may face in determining when to file as to a regulation in order to file timely, as well as the possible ramification that a timely filing results in counsel's filing before his client is "affected" under § 2.2-4026, before there is "final agency action," before his client has standing, and before there is ripeness, resulting in a dismissal for any of those reasons. Finally, I intend to offer suggestions as to how counsel can file timely, but at the same time attempt to avoid dismissals for those other reasons.

CASE BACKGROUND AND OPINION

In *Russell*, the agency, the Board of Agriculture and Consumer Services ("the Board"), voted in favor of the regulation, a regulation for the Eradication of Scrapie from Sheep and Goats, 2VAC5-206, on March 20, 2008, as a final regulation (scrapie is a disease of sheep and goats). That regulation includes a section regulating intrastate trafficking in sheep and goats, 2VAC5-206-20, requiring the affixing of a government issued tag bearing a unique animal identification number to the animal prior to its transfer (even as applied to small farmers, and, say, a gift of one goat from a father to his son). In an apparent effort to comply with Governor Tim Kaine's Executive Order 36 (2006), *Development and Review of Regulations Proposed by State Agencies*, pp. 6-7, the Board posted the regulation online on April 17, 2008, for review by the Department of Planning and Budget ("DPB") (which did not disapprove the regulation); it then submitted such to the Office of the Attorney General (which certified it as not conflicting with law on May 29, 2008); it then submitted such to the Secretary of Agriculture (who approved it on June 12, 2008); and it then submitted such to the Governor (who approved it on July 24, 2008).[1] The agency then filed the regulation with the Registrar of Regulations ("the Registrar") on July 30, 2008, for the purpose of publication in the Virginia Register of Regulations ("the Register"), specifying an October 3, 2008, effective date.

The Registrar published the regulation in the Register on August 18, 2008, as a final regulation, Vol. 24, Issue 25, pp. 3526-31, including notice of the effective date of October 3, 2008. Nothing on the face of the publication states a date of "adoption" of the regulation, as no law requires it to state such. Kathryn Russell ("Russell") filed her notice of appeal to the circuit court on October 30, 2008, 27 days after the published effective date.

In that court, the Board moved to dismiss, contending the "adoption of the regulation" under Rule 2A:2(a) occurred with the March 20, 2008, vote, so that the appeal was untimely. While the Board did not elaborate, it is evident their position was simply by analogy to how a natural person "adopts" a position, idea, etc., namely, by verbally saying, "I adopt X," or raising a hand, or otherwise signifying his mental assent to the position, idea, etc.. That is, the Board contended the "adoption" for an artificial person such as the Board occurred when a majority of the Board members as a collective body at a meeting said, "yea," or raised their hands, or pushed an electronic button, or otherwise signified their vote in favor of the regulation.

The author opposed the motion, contending (1) that, to determine the meaning of the word "adoption," one had to look to dictionaries extant when the Virginia Supreme Court first employed the language of the Rule in 1971 (the language has been unchanged from that time); (2) that, looking to the edition of *Black's Law Dictionary* then in effect, namely, the 4th edition of 1968, we see

> **adopt.** To accept, appropriate, choose, or select; to make that one's own (property or act) which was not so originally.
>
> To adopt a route for the transportation of the mail means to take the steps necessary to cause the mail to be transported over that route. Rhodes v. U.S. Dv.Ct. Cl. 47…
>
> To accept, consent to, and put into effective

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> operation; as in the case of a constitution, constitutional amendment, ordinance, or by-law. Real v. People, 42 N.Y. 282; People v. Norton, 59 Barb. (N.Y.) 191. A. Code. City of Albany v. Nix 21 Ala. App. 164, 106 So. 199, 200….

(3) that the situation thus is one of the word "adoption" having both an ordinary meaning (sometimes referred to as the "popular" meaning or the "layman's" meaning), which appears in the first paragraph, "To accept, appropriate, choose, or select; to make that one's own (property or act) which was not so originally," as well as a strict judicial meaning, which appears in the last paragraph, "To accept, consent to, and put into effective operation; as in the case of a constitution, constitutional amendment, ordinance, or by-law," making it "a word of definite legal signification," also known as a "legal term of art" or a "term of art" or a "technical term"; (4) that in such a situation the rule is well-settled, such rule spanning all written instruments including wills, trusts, deeds, contracts and statutes, that the meaning is the strict judicial meaning unless the context indicates an intent to employ the ordinary meaning or some other meaning; (5) that the context here does not indicate an intent to employ the ordinary meaning or some other meaning; (6) that the meaning is hence the strict judicial meaning; (7) that the regulation was "accepted, consented to and put into effective operation" on the effective date of October 3, 2008; (8) that the regulation was thus "adopted" in the strict judicial sense of the term on October 3, 2008; and hence (9) that the October 30, 2008, filing, being 27 days after October 3, 2008, was within 30 days after adoption of the regulation, and hence timely.[2] The trial court granted the motion to dismiss.

Russell appealed to the Court of Appeals which affirmed the trial court, but not adopting the position of either litigant, instead carving out its own view of "adoption." The Court looked to Va. Code § 2.2-4013, which states in pertinent part,

> A. … Not less than fifteen days following the completion of the public comment period provided for in § 2.2-4007.03, the agency may (i) **adopt** the proposed regulation if the Governor has no objection to the regulation; (ii) **modify and adopt** the proposed regulation after considering and incorporating the Governor's objections or suggestions, if any; or (iii) **adopt** the regulation without changes despite the Governor's recommendations for change.
>
> B. Upon **final adoption of the regulation**, the agency shall forward a copy of the regulation to the Registrar of Regulations for publication as soon as practicable in the Register. All changes to the proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed regulation shall be explained in the final regulation.
>
> D. A **thirty-day final adoption period** for regulations shall commence upon the publication of the final regulation in the Register. The Governor may review the final regulation during this thirty-day final adoption period and if he objects to any portion or all of a regulation, the Governor may file a formal objection to the regulation, suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014, or both.
>
> If the Governor files a formal objection to the regulation, he shall forward his objections to the Registrar and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014 during the thirty-day final adoption period. The Governor's objection, or the suspension of the regulation, or both if applicable, shall be published in the Register.
>
> A regulation shall become effective as provided in § 2.2-4015.

Commenting on this statute, the Court said,

> The problem with determining the date of adoption for the purpose of Rule 2A:2 is that the APA uses the term "adoption" at several different points and in different contexts. For example, Code § 2.2–4013 is the statute which is relevant to this analysis, and it references "adoption" in three different ways.

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> Under subsection A, "adoption" first occurs when the agency decides to adopt a regulation following public comment.

Id. at 91, 415. The Court then noted that subsection B references a "final adoption" that "relates back to the initial adoption." Id. The Court then noted that subsection D's statement of a "final adoption period" "arguably implies that the 'final adoption' referred to" in subsection B "is not actually 'final' at all until the conclusion of the 30-day adoption period." Id. at 92, 415-16.

The Court stated,

> This "final adoption" [subsection D "final adoption"] occurs thirty days after the publication of the final regulation in the Register, whereas the "final adoption" in subsection B is the agency action that triggers the publication of the final regulation in the Register in the first place. Thus, logic dictates that the "final adoption" referred to in subsection D must be separate and distinct from the "final adoption" in subsection B.

The Court then continued,

> So the question then arises, at which point of "adoption" does Rule 2A:2 contemplate that the 30–day period commence within which to note an appeal? Put another way, does "final adoption" of a regulation occur when the agency votes to implement it and forwards the regulation to the Registrar of Regulations for publication or after the expiration of the 30–day public comment period during which the Governor can suspend or suggest changes to the regulation? Procedural due process considerations and the principle that appellate courts may generally only consider issues on appeal which involve lower court judgments, or as in this case, agency decisions which are final, weigh in favor of using the later date as the point at which the period for noting an appeal commences. However, an application of either definition of "adoption" to the record before us results in a conclusion that Russell's appeal was not timely filed.

Id. at 93, 416. The consequence was that the Court refused to say whether "adoption" under Rule 2A:2 meant § 2.2-4013(B) "final adoption" or § 2.2-4013(D) "final adoption." The Virginia Supreme Court denied a petition for appeal.

PROBLEMS CREATED BY THE OPINION

At first blush, it would appear that the panel has merely left lawyers in Virginia in doubt over whether the appeal clock starts ticking on either of but two dates: (1) on the date of filing with the Registrar (here, July 30, 2008) or (2) the date which is 30 days after the date of publication in the Register (here 30 days after the August 18 date of publication is September 17, 2008). The fact that there appears to be only two possible dates comes from the language pertaining to § 2.2-4013(B) "when the agency votes to implement it [the Regulation] and forwards the Regulation to the Registrar of Regulations for publication" because when the agency here "voted to implement it" occurred on March 20, 2008, but the date they "forwarded" it for publication occurred on July 30, 2008, and thus the date in the singular on which they did both acts is July 30, 2008. Also, "the agency action that triggers the publication of the final regulation in the Register" is both the vote on March 20 and the filing on July 30, and hence the "agency action that triggers" must have occurred on July 30. In the panel's discussion of subsection D, the panel explicitly states September 17 as the date on which the clock starts to tick if Rule 2A:2 "adoption" is subsection D "final adoption." Hence, again, it appears at first blush there is but one possible date of subsection B "final adoption," July 30, and a second possible date of subsection D "final adoption," September 17 We are apparently supposed to wait until the legal system chews up it next victim who guesses at the wrong date in order for the courts to reveal to us what is the real date of Rule 2A:2 "adoption."[3]

But in undersigned's view it really isn't clear from the opinion whether the choices are July 30 versus September 17, or instead March 20 versus July 30 versus September 17, thus actually leaving lawyers in doubt as to which of 3 dates is the date when the appeal clock starts ticking. First, although the Court quotes from undersigned's assignment of error which stated the filing with the Registrar occurred on July 30, the Court itself nowhere explicitly states the filing occurred July 30. Thus, the court never explicitly

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tells us that if Rule 2A:2 "adoption" means § 2.2-4013(B) "final adoption," then the appeal time expired on August 29, 2008. Since they explicitly say that under subsection D "final adoption" the clock started ticking on September 17, 2008, and that the appeal period under such view expired on October 17, 2008, why didn't they explicitly say when it started ticking and when the time expired for subsection B "final adoption"?

Second, the court states, "An amended final proposed regulation was adopted by the Board at a March 20, 2008, meeting." Plainly, the panel reads the APA as *in pari materia* ("on the same subject matter") as the Rules of Court, looking to APA § 2.2-4013 to determine the meaning of the rules, and Rule 2A:2 of course speaks of "adoption" of a regulation, not "final adoption" of a regulation. Yet the court never explains why the "adoption" did not occur on March 20, 2008, as contended by the Board, or why it rejected the Board's position. Nor did the Court even attempt to explain the obvious, that it was redrafting Rule 2A:2 from "adoption" to "final adoption," when the Court of Appeals lacks power to redraft a rule of court.

Third, subsection B states, "Upon final adoption the agency shall forward…," and it is evident from this plain language that "final adoption" must precede the forwarding, that is, there is in time first the "final adoption," and then after the final adoption "the agency shall forward." And we cannot conceive what that action is before forwarding other than the vote, here on March 20. So if Rule 2A:2 "adoption" is subsection B "final adoption," then Rule 2A:2 "adoption" must be the vote because subsection B "final adoption" is the vote. Yet, as noted, the court speaks of subsection B final adoption as occurring at the moment where there is both the vote and the forwarding ("**this action** [in the singular] by the agency [is] the 'final adoption'"), that is, "final adoption" occurs with the forwarding. The court never explains how a "final adoption" under subsection B, which textually occurs before forwarding, can occur on forwarding.

Fourth, the opinion, assuming Rule 2A:2 "adoption" is subsection D "final adoption," states, "[O]n September 17, 2008, the regulation was 'adopted' and became effective." Id. at 93, 416. Yet the opinion also states, "The regulation had an effective date of October 3, 2008[,]" Id. at 90, 415, and nowhere explains how a regulation can become "effective" on a date earlier than its "effective date." Such failure to explain is especially problematic in light of Va. Code § 2.2-4015, a Code section which the panel never quotes from and which states,

> A. A regulation adopted in accordance with this chapter and the Virginia Register Act (§ 2.2-4100 et seq.) **shall become effective** at the conclusion of the thirty-day final adoption period provided for in subsection D of § 2.2-4013, **or any other later date specified by the agency**, unless: [there is legislative or gubernatorial objection, or agency suspension].

Since the October 3, 2008, date is a "later date specified by the agency," then that is the date it became effective, not September 17, 2008.

In sum, if a client comes to counsel within 30 days after the vote, it is difficult to see how one can safely tell him, "Under authority of *Russell*, let us wait until the date of forwarding to the Registrar, and then file within 30 days thereafter," or "Let us wait until the date that is 30 days after the date of publication and then file within 30 days after that date regardless of whether the agency has specified a later effective date." And of course the precedent itself may get overruled. Given that the panel rejected undersigned's position that Rule 2A:2 "adoption" is the dictionary strict judicial meaning, then, until the matter is straightened out, the date of the vote urged by the Attorney General still appears as much a possibility as the other two possible dates.

Let us now demonstrate the additional problems that arise whether the Courts ultimately rule the date on which the appeal clock starts to tick is (1) the date of the vote, (2) the date of forwarding, or (3) the date which is 30 days after the day which is 30 days after publication (hereinafter "the 3 possible dates").

THE PANEL'S CHOICE OF POSSIBLE DATES FOR WHEN THE APPEAL CLOCK STARTS TO TICK MAY LEAVE COUNSEL HAVING TO FILE WHEN HIS CLIENT IS NOT "AFFECTED" UNDER VA. CODE § 2.2-4026 AND HENCE WHEN THE SOVEREIGN HAS NOT CONSENTED TO BE SUED.

Preliminarily, if the Court of Appeals ultimately decides that the date of adoption is subsection D "final adoption," then the hereinafter problems only face counsel representing

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a client for whom the agency has designated an effective date later than the default effective date of 30 days post publication. The reason is because where no later effective date is specified, the effective date is 30 days post publication, and an appeal filed within 30 days after such date will necessarily be filed while the regulation is effective. However, if the court ultimately determines that the date of adoption is the date of subsection B "final adoption," and that such date is the date of the vote, or that it is the date of subsection B "final adoption" and such is the date of forwarding, then the hereinafter described problems necessarily confront him.

APA suits are suits against the sovereign, and it is axiomatic that such suits may be conducted only with the consent of the sovereign. Furthermore, such consent can only be manifested by a statute of the legislature, and, where the statute fixes terms and conditions of the suit, those terms and conditions must be complied with, or else a defense of sovereign immunity will be sustained. Va. Code § 2.2-4026 grants a right to sue only to "a person affected," and thus the issue of whether the person suing is a person affected under § 2.2-4026 is interwoven with the sovereign immunity issue. As we intend now to demonstrate, had Russell filed commencing on any of the 3 possible dates, she would have filed when she was not a "person affected" and hence without authority under § 2.2-4026 and without the consent of the sovereign.

The Scrapie Regulation simply did not affect Russell in any way prior to the effective date of October 3, 2008. Prior to that date, she could sell a goat or sheep, or lease one, or buy one or otherwise transact without having to affix an ear tag or other identifying number. It was only after the effective date that if she made such a transfer without affixing the tag that she could be criminally prosecuted.

Ironically, at a hearing before the Joint Commission on Administrative Rules on January 8, 2008, in opposing the efforts of Russell and other small farmers acting under the Virginia Independent and Consumer Farmers' Association ("VICFA"), the State Veterinarian, Dr. Richard Wilkes, stated in response to questioning by Delegate Hull, "However, no one is required to have identification until the sheep enter commerce." (http://dls.state.va.us/GROUPS/jcar/meetings/010808/sm010808.pdf) If a person simply owned sheep or goats, and never formulated an intent to sell or otherwise transfer the animals, the regulation would never affect him at all. In our case, Russell had an intent to transact, but it was as of the effective date, and so she came to be affected as of that date, not affected prior to it.

One can envision a legislative schema and regulation under which a person could be "affected" prior to the effective date. For example, if the Board had no power to withdraw or amend its regulation prior to the effective date, so that upon the vote there is nothing to prevent the regulation from becoming effective save the mere passage of time, and the Board had voted to require all sheep and goat owners to have a building which, under the state of the art then existing, required 7 months to build, then, immediately upon the March 20 vote, Russell would for all practical purposes have been affected. The reason is that the March 20 vote would have forced her immediately to commence construction of a building so as to be compliant on the effective date. But, as we intend to demonstrate and discuss below, in Virginia agencies do have a power to withdraw their regulations at any time prior to the effective date, and the requirement of tagging an animal prior to a sale required no action prior to the effective date.

Note that the requirement there be consent to sue the sovereign by a statute of the legislature, and, if the legislature grants consent on terms and conditions, that those terms and conditions must be met, pertains to the subject matter jurisdiction of the court. *Afzall ex rel. Afzall v. Com.*, 273 Va. 226, 639 S.E.2d 279 (2007). If the requirements are not met, then the courts lack subject matter jurisdiction, Id., with the consequence that the mere failure of the Attorney General timely to defend on grounds that the plaintiff is not affected cannot prevent him from later raising that defense. Id.; See also *Com. v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 877 (2000). Indeed, in the total absence of the Attorney General raising the defense, the court may raise the issue *ex mero motu* (of its own accord), and, indeed, has a duty to raise the issue *ex mero motu. Afzall ex rel. Afzall v. Com.*, at 230, 282 ("[T]he want of such jurisdiction of the trial court [subject matter jurisdiction] will be noticed by this court *ex mero motu*.")

PANEL OPINION MAY REQUIRE A FILING PRIOR TO "FINAL AGENCY ACTION."

It is also axiomatic that an appeal from an agency regulation lies only at the conclusion of "final agency action," and that any appeal prior thereto must be dismissed as premature.

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In Order to Appeal Timely *(continued)*

Mr. Justice Scalia gave the classic formulation of final agency action in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997):

> First, the action must mark the "consummation" of the agency's decisionmaking process -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Regarding the first prong, when the "consummation" of the agency's decision-making process occurs in Virginia, of significance is Va. Code § 2.2-4016, another Code section which the *Russell* panel fails to mention, and which states,

> Nothing in this chapter shall prevent any agency from withdrawing any regulation at any time prior to the effective date of that regulation. A regulation may be repealed after its effective date only in accordance with the provisions of this chapter that govern the adoption of regulations.

It is evident the statute creates a situation where, upon the vote by the agency in favor of any regulation as a "final regulation," it is as if there is appended to the regulation the words, "But we reserve the right to withdraw this regulation at any time prior to the effective date." Since the effective date was October 3, 2008, the Board had a power to withdraw the regulation at any time prior thereto, and the question arises, "When does the 'consummation' of the agency's decisionmaking process occur given the power to withdraw under § 2.2-4016?"

To answer such question, we must look to the opinion of a U.S. Supreme Court Justice, then federal court of appeals judge, Ruth Ginsburg, in *National Treasury Employees Union v. Federal National Labor Authority*, 712 F.2d 669 (D.C. Cir. 1983):

> An agency's order becomes "final" or "effective" for appellate review purposes when the agency arrives at a terminal, complete resolution of the case before it. An order lacks finality in this sense while it remains tentative, provisional, or contingent, **subject to recall, revision, or reconsideration by the issuing agency.**

Id. at 670-71 (emphasis added). Referring to prior cases, she stated, "[A]nd in *Cardin* and *Windom*, there was nonfinal, interlocutory agency action, because a RIF notice, prior to the specified effective date, can be amended or cancelled." Id. at 675. In a footnote, she wrote,

> RIF notices, because they are conditional--they may be withdrawn, altered, or amended--can be compared to class action certifications in civil litigation. See Fed.R.Civ.P. 23(c)(1). Such certifications are interlocutory and may not be appealed as a matter of right.

Id. at 675, n. 14.[4] Since the Board had a power to withdraw the regulation on any of the 3 possible dates, it follows there was then no consummation of the decision-making process, and hence then no final agency action, and hence an appeal at such time would have been premature.

Regarding the second prong, first, as noted above, § 2.2-4026 grants a right of judicial review to a person affected by and claiming the unlawfulness of a "regulation." Va. Code § 2.2-4001 defines "regulation" as follows:

> "Rule" or "regulation" means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.

Hence, a right of judicial review does not arise until there is "force of law," and there cannot be force of law until the arrival of the effective date. Since that is the date on which rights or obligations have been determined, then that is the date of final agency action, and that is the date on which a right to seek judicial review arises.

Second, Va. Code § 2.2-4027 authorizes judicial review of "agency action", and Va. Code § 2.2-4001 defines such as follows:

> "Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or

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In Order to Appeal Timely *(continued)*

> denial of relief or of a license, right, or benefit by any agency or court.

Since, as noted above, Russell could not be sanctioned for any conduct occurring on any of the 3 possible dates, there was then no "agency action" under § 2.2-4027, and hence at that time no authority for judicial review.

Also, the requirement there be final agency action before a complainant may appeal has also been characterized as jurisdictional. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 857 (4th Cir. 2002) ("Because we conclude that the Report was not final agency action, and therefore, that the district court lacked subject matter jurisdiction to hear plaintiffs' claims [citation omitted], we do not reach the standing issue."); *Tomer v. Maine Human Rights Comm.*, 962 A.2d 335, 338 (Me. 2008) ("The authority granted to courts pursuant to the APA allowing judicial review of 'final agency actions' is a jurisdictional issue."); *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (C.A.D.C., 1996) (" The requirement of a final agency action has been considered jurisdictional.")

THE PANEL'S OPINION MAY CAUSE COUNSEL TO FILE APPEAL BEFORE THE CLIENT HAS STANDING AND THERE IS RIPENESS.

An analysis similar to the above could be made demonstrating that *Russell* may require counsel to note appeal at a time when his client lacks standing because, as noted above, on any of the 3 possible dates *Russell* was not affected, and hence not injured, and hence did not suffer "particularized injury" as is required to show standing. And *Russsell* may require counsel to note appeal prior to there being ripeness because ripeness requires the plaintiff to plead that he felt the effects of the regulation in a concrete way, and, *Russell* not feeling the effects at all on any of the 3 possible dates, could not have felt them in a concrete way on any of the 3 possible dates. As with sovereign immunity and final agency action, standing and ripeness are issues that the circuit court and court of appeals are duty-bound to raise *sua sponte*.

SUGGESTIONS TO COUNSEL IN DEALING WITH *RUSSELL*

Because of the language of Rule 2A:2, "within thirty days **after** adoption of the regulation," merely noting appeal **before** the adoption is not ultimately an option for attempting to appeal timely because such an appeal, being filed too early, is as untimely as one filed too late. *Western Union Telegraph v. Federal Communications Commission*, 773 F.2d 375 (D.C. Cir. 1985) (Scalia, Judge). Given the confusion generated by *Russell*, undersigned's suggestion is for counsel to attempt *seriatim* filings of the notice of appeal and petition for appeal, referencing *Russell* in each of the documents. Thus, if the client comes to you within 30 days after the vote, file the notice of appeal within 30 days after the vote, stating therein you are filing because under the precedent it is not clear when you should file. Then, file your petition for appeal within 30 days thereafter, again referencing *Russell* and the uncertainty it creates as to when to file. Be as honest as you can in your petition as to how your client is affected or may come to be affected.

Presumably, the agency will still post the regulation online for DPB, circulate it to the Attorney General, then to the appropriate Secretary of the Department, and then to the Governor, and, upon obtaining the requisite approvals, then forward to the Registrar for publication, which will publish, noting the agency filing (forwarding) date. Then, within 30 days after the forwarding, re-file your notice of appeal and then your petition for appeal, again referencing *Russell* in each document.

Then, after publication in the Register, and within 30 days after 30 days post publication, re-file your notice of appeal, again referencing *Russell*. Then file your third petition for appeal, again referencing *Russell.* With respect to whatever date the courts ultimately determine is the date the clock starts to tick, it will regard your notice of appeal and petition for appeal filed with reference to that date, and disregard as nullities the notice of appeal and petition for appeal filed with reference to the other two possible dates.

SUGGESTIONS FOR CHANGE TO RULE 2A:2(a).

The legislature should change § 2.2-4026 to state,

> shall have a right to the direct review thereof by a court action against the agency or its officers or agents. **The person affected shall file notice of appeal within thirty days after first being affected by the regulation.**

Such language preserve the idea of a 30 day limitations period, but will make clear that the time when the appeal clock

In Order to Appeal Timely *(continued)*

starts ticking isn't ultimately dependent on actions taken by the agency at all, but on when a person is first affected. Thus it will effectuates the legislature's intention that *any* person affected have judicial recourse even if he is not first affected until years after a regulation's effective date. ❋

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(Endnotes)

1. The pertinent language of EO 36 (2006) is substantially identical to the analogous provisions of Governor McDonnell's Executive Order 14 (2010), *Development and Review of Regulations Proposed by State Agencies.*

2. In *Kole v. City of Chesapeake*, 247 Va. 51, 439 S.E.2d 405 (1994), the Court held that a municipality's "decision to adopt" an ordinance within the meaning of a statute occurred on the date which was 30 days after the vote, such being its effective date. Also, the following authorities hold that the word "adoption" is a legal term of art, such that the "adoption" does not occur until the ordinance, regulation, etc., is put into effective operation: *American Federation of State, County and Municipal Employees v. Philadelphia*, 83 Pa. D. & C. 537, 552 (Ct. of Common Pleas, 1952) ("'The primary and natural signification of the word adoption ... includes both take effect and in force'; *People v. Norton*, 59 Barb. 169[,]" quoting from Bouvier's Law Dictionary; *City of Columbus v. Rudd*, 193 S.E.2d 11, 13 (Ga. 1972) ("Accordingly, the proper construction of the word 'adoption' here requires that it be construed as "effective date" of the charter…"); *Langevin v. Begin*, 683 A.2d 357, 358 (R.I. 1996) ("The word 'adopt' is defined as 'to accept, consent to, and put into effective operation.' Black's Law Dictionary 49 (6th ed. 1990).").

Stating that the appeal clock starts ticking on the date of adoption, but construing such as adoption in the strict legal sense, amounts to the same thing as saying the clock starts ticking on the effective date because the regulation can't be consented to so as to be put into effective operation prior to the effective date. The framers of the Model State Administrative Procedure Act selected the "effective date" as the date when the clock starts to tick with respect to complaints of agency procedural violations, but chose no limitations period for complaints based on other grounds: "Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time." Sec. 503(a), *Revised Model State Administrative Procedure Act* (2010).

3. The panel hints that, when called upon to decide, it will rule in favor of subsection D "final adoption" because that date is a date which avoids due process problems which may confront subsection B "final adoption." ("Procedural due process considerations… weigh in favor of using the later date…")

4. Judge Ginsburg's rule, that a regulation which the agency may still withdraw is merely interlocutory and not final, has been adhered to in the following cases: *Bellarno Intern, Ltd. v. Food and Drug Admin.*, 678 F.Supp. 410, 416 (E.D. N.Y. 1988); *City of Park Hills v. Public Svc. Comm. of the State of Mo.*, 26 S.W.3d 401 (Mo. App. W.D. 2000); *Essex County v. Zagata*, 672 N.Y.S.2d 281, 284-85, 695 N.E.2d 232 (Ct. App. N.Y. 1998); *DRG Funding Corp. v. Secretary of Housing and Urban Development,* 76 F.3d 1212, 1214 (D.C. Cir. 1996).

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process;[3] (2) increasing coordination on the *interregional* plane; (3) ensuring the planning process addresses so-called "public policy requirements" (e.g., renewable resource and energy efficiency goals, whether set by Federal, state, or local governments);[4] (4) banishment from FERC-regulated tariffs and agreements of any Federal "right of first refusal" (ROFR) that enshrines an "incumbent's" right (vis-a-vis independent developers) to construct new transmission facilities;[5] and (5) a template of six "cost allocation principles" applicable to regional and interregional projects.

Order 1000 (along with its clarifying progeny) were only the starting point for implementation. It remained for RTOs, ISOs, and "standalone" transmission owners (TOs)[6] to make Order 1000 compliance filings, since FERC had left many details to that stage. Last October, the first great wave of compliance filings took place.[7] On March 22, 2013, FERC issued an order evaluating and conditionally accepting the coordinated filings of PJM and its participating TOs. This article will focus on the highlights of that massive (roughly 200 page) compliance filing order, including what flew with FERC and what didn't. Of particular interest to practitioners and regulators should be: (1) FERC's handling of the clash between those parties cheering on the demise of an "incumbent TO ROFR" and those seeking to preserve it (especially where states *prefer* the "regulated vertical monopoly" model); (2) PJM's current lack of a transmission planning paradigm that makes "public policy requirements" a chief priority; and (3) FERC's reaction to a major reconfiguration of the way PJM allocates the costs of higher-voltage projects with "regional" impact.

The incumbent TO's ROFR: how much of it may survive? While Order 1000 seems, at first glance, designed to put a stake through the heart of a franchised TO's preference, or ROFR, to build out the transmission system – believing, instead, that the public interest requires injecting competition into this last bastion of the traditional monopoly[8] – the exceptions to the order's general ban, coupled with its nod to conflicting state policies leaves some room for argument.

It was especially striking that PJM itself had a different take from most of its participating TOs. The RTO's compliance filing contended its "Operating Agreement" (OA) does *not* contain any broad incumbent ROFR, either for "reliability" or "economic" projects. Conversely, the TO group maintained there was an ROFR for reliability-driven projects, though "economic" projects were concededly fair game for competition. Moreover, argued the TOs, if FERC wishes to declare this ROFR "unjust and unreasonable" under the FPA, it faces the hurdle of the *Mobile-Sierra* doctrine, which protects previously FERC-approved contracts from abrogation absent a showing of a compelling "public interest."

FERC – which in Order 1000 had deferred the *Mobile-Sierra* question to the individual compliance filings – found an artful way around the TOs' legal objections. First, as a threshold matter, it rejected PJM's position that neither its OATT nor its OA harbors any Federal ROFRs -- finding the OA's language "ambiguous" in the case of reliability-based projects. But it then held it was not impeded by the *Mobile-Sierra* doctrine from banishing the offending provisions. In so ruling, it discerned a distinction, for *Mobile-Sierra* purposes, between "contract rates" (which, said FERC, are protected under the doctrine) versus terms of "general application" (which it said are *not* protected, even if in the same agreement). Whether FERC's distinction will be deemed sound by an appellate court, or merely artful advocacy, remains to be seen, as the point is hotly contested.

FERC also found a way around another roadblock – this one uniting PJM and its TOs. In revising the OATT and agreements to comply with Order 1000, PJM had included a planning process with an open solicitation of bidders -- *unless* the laws or regulations of a state hosting the project preclude such competition for construction rights.[9] This did not seem, at the time, like outright defiance of FERC, since Order 1000 professed it was *not* FERC's intent to override state laws or policies regarding transmission siting. But when the Commission actually came face to face with an open solicitation process in a compliance filing that backs off if a state's position is "That's not how we do things down here," it declared that PJM's deferential approach would reinstitute a "Federal ROFR" and must be deleted.[10] That posture was applauded by an independent developer, LS Power, as well as one maverick state commission, the Illinois Commerce Commission (ICC), which takes every opportunity to denounce and delimit incumbent preferences. But it also produced consternation -- not only for PJM, its TOs, and other state advocates, but also for two of the five FERC Commissioners (who, in forceful dissents, remarked that the majority's stunted view of Order 1000's deference to state law would unleash a wasteful and divisive process forcing

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states retaining an ROFR to make their stands at the *end* of the bidder selection process, rather than upfront).[11]

FERC was more receptive, however, towards PJM's other exceptions to the general prohibition on Federal ROFRs – overriding the objections of LS Power. It conditionally approved exceptions under which the RTO could (1) discontinue the competitive solicitation process if no qualifying bids were received during the "open window" (turning, in such cases, to the incumbent TO as the "default" constructing entity); or (2) waive the process entirely in "urgent need" situations (defined as reliability projects that must be completed in three years or less). Moreover, in a passage that must have had independent project developers fuming, FERC observed that an RTO's selection process *may* legitimately take into account that a non-incumbent is likely to have a tough time getting a state to certify its construction of a facility, even if selected to construct by PJM.

Public policy requirements: does PJM's planning process give them short shrift? Unquestionably, one of Order 1000's marquee features was the directive that transmission planning must serve "public policy" goals, alongside reliability and economic efficiency. PJM's position was that it could comply with that directive by integrating public policy planning objectives into its existing "scenario-based" planning platform, which is designed to determine what expansions or upgrades are necessary to meet reliability and economic benchmarks. PJM's position drew an outcry from parties believing that Order 1000 compliance should include a project planning category focused on gathering and transmitting renewable resources; such purposes should not be mere filters added to existing reliability and economic efficiency planning models.

Part of PJM's defense was that Order 1000 does not, on its face, *require* a distinct project planning category for public policy considerations. As fallbacks, it noted that (1) it has devised a "State Agreement Approach" that enables individual PJM states to agree upon upgrades they will fund (*e.g.*, to facilitate meeting state-based renewable portfolio standards); and (2) it is currently in discussions with stakeholders regarding a new, "multi-driver" project planning category that, if adopted, would spotlight meeting public policy goals. Opponents countered that a purely "voluntary" planning category, coupled with pledge to work on a new multi-purpose planning category, could not possibly satisfy the immediate demands of Order 1000. But FERC concluded that, for the most part, PJM was in the clear. It agreed with the RTO that Order 1000 does not mandate a separate planning process devoted to public policy drivers, although it encouraged the RTO to continue along that path with its stakeholders.[12] And it endorsed PJM's methodology that strikes a balance between flexibility in "scenario" planning and prescriptiveness, rather than leaning heavily to the latter.

The "hybrid" approach to high-voltage project cost allocation: whether PJM has found a happy medium. As followers of PJM are well aware, its move in the middle of the last decade to 100% regionalization of the costs of new projects rated at 500 kV or greater through a "postage stamp" allocation, while placating FERC (which prescribed the idea), was a continuing source of dissension and litigation, as western PJM members (and their regulators) believed the practice forced their ratepayers to bear a *pro rata* portion of expensive projects of little or no benefit to Illinois or Ohio consumers.[13] After much stakeholder debate, PJM's TOs in this proceeding proposed a new cost allocation that roughly split the difference between the "postage stamp" approach for high-voltage projects and the more customized, "beneficiary pays" methodology in use for sub-500 kV projects. Moreover, PJM and the TOs redesigned the latter method – DFAX[14] -- from one more geared towards diagnosing the relative contribution of flows causing the "violation" that drives the reliability upgrade to a version that measures ongoing proportionate usage of the upgraded facilities by benefiting loads.[15]

Accordingly, for "reliability" projects, 50% of a high-voltage facility's costs would be allocated footprint-wide via the postage stamp method; the other 50% would be allocated by relative benefits, according to the DFAX method. For "economic efficiency" projects, the 50% *not* allocated through the postage stamp method would be allocated by an alternative measure of benefits (specifically, an estimate of relative energy savings to loads). In another major shift to PJM's cost allocation construct, the filing proposed to move down the breakpoint for what's considered "high voltage": in addition to facilities rated at 500 kV or above, double-circuited projects rated at 345 kV or greater would also be subject to the 50/50 allocation for high-voltage projects.

Predictably, stakeholders – depending on whether they resided in eastern or western camps – rebuked the proposal because it did not square *completely* with their preferred positions (*i.e.*, either a 100% postage stamp allocation or a

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100% DFAX allocation). This did not deter FERC, which generally approved the new PJM cost allocations and found them (with one exception) compliant with the six principles etched into Order 1000. (PJM's compliance filing had failed to explain, as required by the fourth principle, how the RTO would determine whether its projects had an adverse effect on adjacent systems and – if so – whether and how adverse effects would be mitigated by PJM stakeholders.)

Conclusion: the dust has not settled yet. Transformational rulemaking is not accomplished overnight. Order 1000, now almost two years into its existence, is a long ways down the road but still a long ways from its destination. Moreover, as seen above, it has catalyzed a healthy debate, both within and outside the walls of FERC, regarding how just how sweeping should the construction competition mandate should be, particularly for states employing a contrasting regulatory model. Rehearing and clarification requests were filed in April, continuing many of the philosophical arguments in the original rulemaking. The march to the D.C. Circuit Court of Appeals has begun as well. But whether or not FERC succeeds in all its objectives, it seems transmission planning will never be quite the same. ❊

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(Endnotes)

1. "OATT" stands for "open access transmission tariff," FERC's standardized version to which the tariffs of individual transmission providers (including RTOs/ISOs) must either adhere or justify any deviations.

2. "*Transmission Planning and Cost Allocation by Transmission-owning and Operating Public Utilities*," RM10-23, 136 FERC ¶61,051 (July 21, 2011), *clarified*, Order 1000-A, 139 FERC ¶61,132 (May 17, 2012).

3. For transmission-owning utilities (TOs) participating in RTOs/ISOs, the obligation attaches at that level. And since RTOs/ISOs have been producing joint regional transmission plans for some time, the impact of this plank of Order 1000 was less dramatic. However, FERC's push into *interregional* planning is a game-changer even for RTOs.

4. This was prompted by FERC's perception that "public policy" drivers were something of a stepchild of regional and individual utility transmission planning, which focuses more on system reliability and economic efficiency.

5. Importantly, there are significant exceptions to the ban on an incumbent ROFR. The prohibition applies to new transmission projects seeking "regional" cost allocation; new facilities whose costs are absorbed 100% by the incumbent owner and its customers, or which are essentially upgrades to existing lines, are *not* subject to the ban.

6. Many TOs in regions not populated by RTOs or ISOs have joined planning groups to facilitate FERC compliance.

7. FERC is requiring compliance filings on the interregional planning/cost allocation aspects at a later date.

8. Note that new transmission facilities built by *non*-incumbents would not "compete" with existing infrastructure on a price basis to capture business (as does the "merchant" transmission). Rather, an independent developer bids for the right to construct facilities that then become part of the cost-based, integrated system serving everyone. The economic theory is that opening construction rights to competition will lead to lower costs in the ratebase.

9. The same result would obtain if an incumbent's rights-of-way would be altered thereby.

10. MISO's compliance filing similarly had a competitive bidding process that receded if state laws or regulations preserve an incumbent's ROFR; and, just as here, FERC held the RTO must strike it in a new compliance filing.

11. The dissenting commissioners also wondered whether the majority's strategy was to force state commissions to *choose* between maintaining their incumbent preferences and having the ability to share project costs with TOs (and loads) in other states -- since there is no restriction in Order 1000 on an incumbent TO ROFR for projects *not* seeking regional cost-sharing. The ICC's position, in fact, is forcing such a "choice" should be the rule.

12. The March 22 order did require PJM to clean up some aspects of its compliance filing, however. For example, it directed the RTO to clarify *how* it will select, from among a field of initially identified public policy requirements, the ones for which "solutions" will be evaluated in the current planning cycle; and it must commit to posting an explanation of why some were selected and others not.

13. Indeed, as new projects increased west-to-east transfer capacity, they tended to levelize generation capacity and energy prices throughout PJM's footprint – thus adding insult to injury for the western loads that had enjoyed lower prices.

14. The acronym is short for Distribution Factor.

15. Both methods are forms of "causation-based" cost allocation, but the new DFAX approach would reflect ongoing shifts in use, rather than a static "snapshot" of causation.

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hedges its business risks with derivatives. The panel will also be of interest to any company that buys or sells carbon offsets, renewable energy credits or "Sox" and "Nox" allowances. Commissioner Sommers is joined on the panel by Russ Behnam of the U.S. Senate Agriculture Committee (for Senator Stabenow) and by Attorney Jeremy D. Weinstein of the Environmental Markets Association.

Dave Hawkins of the Natural Resources Defense Council, Mary Anne Hitt of the Sierra Club and Cale Jaffe and Frank Rambo of the Southern Environmental Law Center will provide the environmental community's viewpoints to several panel discussions.

Christopher Horner of the Competitive Enterprise Institute will offer a free-market environmentalism or classical libel perspective. Robert P. Powers of American Electric Power and Bernard L. McNamee of McGuireWoods will provide customer, industry, and market perspectives on energy and environmental policies.

David Bradley, an Australian Lawyer with Lander & Rogers will add the Australian perspective to the National Energy Policy debate. The Australian election in September, shortly before the Symposium, is widely viewed to be a referendum on Australia's National Energy Policy so Mr. Bradley will offer a timely and interesting perspective. And Spilman, Thomas & Battle attorney J. C. (Max) Wilkinson will contribute to this panel to discuss public costs and public risks to National Security that arise from ill-managed energy policy.

Clean Energy R&D Center director Ed Rogers will highlight some of the companies CER&DC is working with and their innovative approaches in the energy industry. And he will be joined on the New and Emerging Energy Technologies panel by Jerry Grantham, a geologist and Vice-President with Range Resources who will speak to the changes brought about by Shale Gas.

Three professors from the Appalachian School of Law will join Virginia Tech Professor Michael Karmis as the academic cadre.

Program moderator David Bailey ("This week in Richmond") believes this Symposium brings a new refreshing approach to the debate about Energy. "Instead of partisans yelling and pointing the finger at each other, this Symposium will provide a courteous and civil atmosphere where advocates can agree to disagree and hopefully discover some common ground in the process." Bailey moderated a health forum sponsored by the law school addressing the Affordable Care Act. "The consistent feedback about that forum", said Bailey, "was the genuine appreciation for the civility displayed by participants in the debate who argued their positions passionately but respectfully".

For more information about the Symposium, visit the Appalachian School of Law's website at www.asl.edu.

The Appalachian School of Law will apply for 6.5 hours of CLE credit in advance of the symposium. ❊

About the Author: Daniel H. Caldwell serves as counsel to the Natural Resources Law Program at the Appalachian School of Law in Grundy, Virginia where he leads and directs the implementation of all programs. Prior to joining ASL in 2012, he practiced law in Southwest Virginia for 34 years. He is a principal with the Abingdon law firm of McElroy, Hodges, Caldwell & Thiessen where he has a litigation practice and advises energy clients. He is a 1977 graduate of the University of Virginia School of Law.

Unemployment Insurance *(continued)*

considers and weighs those factors depends upon the individual circumstances. A case by case analysis, however, does not address the important issue of public policy.

At least one recent author[21] has criticized the wisdom of allowing claimants to double dip into both the Unemployment Insurance and Social Security disability funds. Granting full disability benefits to claimants who are working, or have already worked, may also be questioned. An election of remedies (UI or DIB) is one possible approach;[22] capping benefits or benefit set offs may also be considered. There is, however, no way to completely eliminate the contradictions inherent in all work relief programs, and while seeking to encourage employment, reduce counter-incentives, and eliminate windfalls, policy makers should be keenly sensitive of the potential harm to unemployed, or precariously employed, medically impaired people. ❊

About the Author: David J. Agatstein is a federal Administrative Law Judge for the Social Security Administration, currently assigned to the Los Angeles Downtown Office of Disability Adjudication and Review; he previously served as a New York State Unemployment Insurance ALJ. The opinions and errors contained in this article are his own, and do not necessarily reflect the views of any agency of government.

(Endnotes)

1. 42 U.S.C. 503 (12), P.L. 112-96 sec. 2101(a), effective February 22, 2012

2. 42 U.S.C. 416 (i)(1)

3. McGhee v. Barnhart, 366F.Supp. 379 (W.D. Va. 2005)

4. 20 CFR 404.1572(b)/416.972(b)

5. 20 CFR 404.1574(a)(1)/416.974(a)(1)

6. http://www.ssa.gov/oact/cola/sgadeg.html

7. Earnings do not affect the benefit rate of an insured worker. The benefits of an SSI claimant are reduced if the claimant has earned income. 20 CFR 416.1100

8. 20 CFR 404.1574(C)/416.976

9. 20 CFR404.1592

10. "Well I've Been Looking Real Hard, and I'm Trying to Find a Job, But it Just Keeps Getting Tougher Every Day" Steve Miller Band, Rock 'n Me, on Fly Like an Eagle (Capitol Records 1976), quoted in Drew A Swank, Money for Nothing: Five Small Steps to Begin the Long Journey of Restoring Integrity to the Social Security Administration's Disability Programs, 41 Hofstra L. Rev. 155 (2012) at pg 175 (herein "Swank")

11. 20 CFR 404.621(a)

12. The conforming Virginia provision is in Va. Code Ann 60.2-612(7)

13. Such as those in Unemployment Comp. Comm'n v. Tomko, 192 Va. 463 (1951)

14. In contrast to the exhaustive, probing, detailed and skeptical evaluation of the medical evidence in Social Security disability cases. 20 CFR 404.1527/416.927

15. Compare Unemployment Comp. Comm'n v. Dan River Mills, Inc., 197 Va. 816 (1956)

16. The Virginia experience rating table is at Va. Code Ann. 60.2-531

17. Benefits paid to Virginia State employees under the Virginia Sickness and Disability Program are adjusted by benefits paid under any compulsory benefits law, such as Workers' Compensation, severance, or unemployment compensation. Policy Number 4.57, revised 11/25/05

18. Because different disability laws and plans have different definitions and standards of disability, the "one or the other" approach adopted in McGhee , supra, is rarely feasible.

19. Social Security Ruling 05-02. The Virginia total unemployment rule is in Va. Code Ann. 60.2-226

20. Adjudication Tip #34, quoted in Swank, supra, at page 176

21. Swank, supra, at page 175

22. Swank, supra, at page 177

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