

# Administrative Law News

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## CONTENTS:

**Commission Approves  
Performance Based Rate Plan for  
Virginia Natural Gas ...1**

*Jim Copenhaver*

**National Regulatory Conference  
Turns 25 Years Young ...2**

*Brian R. Greene*

**Message From the Chair ...3**

*Jim Copenhaver*

**Commission Rules on Dominion's Coal  
Fired Plant Plans ...4**

*John Pirko*

**Office of Attorney General Releases  
Annual Report on the Status of  
Stranded Costs ...5**

*Vishwa Bhargava Link*

**Telephone Directory Distress —  
PUC-2005-00007 ...6**

*Kiva Bland Pierce*

**Telecom: Revised Rules Governing  
Disconnection Adopted ...7**

*Allison L. Held*

**Regulatory Lawyers Reflect on  
Ethical Issues ...7**

**Website News; Membership Form ...10**

**VSB Administrative Law Section  
Board Members ...11**

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## Commission Approves Performance Based Rate Plan for Virginia Natural Gas

First PBR under Virginia Code §56-235.6

The Virginia State Corporation Commission (the "Commission") issued an Order on July 24, 2006 authorizing Virginia Natural Gas ("VNG") to implement the first performance based rate regulation methodology ("PBR") under Va. Code § 56-235.6 by a natural gas utility in Virginia. The core components of the PBR include a freeze of VNG's non-gas base rates for five years and the construction by VNG of a pipeline crossing the James River/Hampton Roads Channel, which would connect for the first time VNG's northern and southern distribution systems at an estimated cost of between \$48 and \$60 million.

Prior to filing for approval of its PBR, the Commission required VNG to file a fully adjusted cost of service study in connection with VNG's proposed extension of its experimental weather normalization adjustment.<sup>1</sup> In that proceeding, the Staff of the Commission ("Staff") filed a Supplemental Staff Report on VNG's cost of service study,

concluding that VNG had earned in excess of its authorized Return on Equity and that its rates were no longer just and reasonable.<sup>2</sup> The Staff thereafter filed a motion requesting that the Commission require VNG to demonstrate why its current rates and charges should not be the subject of a hearing on the justness and reasonableness of such rates and charges and why its rates should not be made interim and subject to refund.<sup>3</sup> By Order issued April 29, 2005, the Commission denied the motion, but directed VNG to file a base rate proceeding by July 1, 2005.<sup>4</sup>

— continued on page 8



1. *Application of Virginia Natural Gas, Inc. For extension of its Weather Normalization Adjustment Rider*, Case No. PUE-2002-00237 ("WNA Extension Application").

2. *Id.* March 2, 2005 Supplemental Staff Report.

3. *Id.* March 9, 2005 Motion by the Staff of the State Corporation Commission.

4. The April 29, 2005 Order on Motions was issued in response to the Staff's March 9, 2005 Motion in the WNA Extension Application and VNG's April 22, 2005 Motion for Waiver of Annual Informational Filing in *Application of Virginia Natural Gas, Inc. For an Annual Informational Filing*, Case No. PUE-2005-00028, wherein VNG noted its intent to file a general rate case on or before December 31, 2005 or such other date prescribed by the Commission.

*Jim Copenhaver is Lead Counsel with NiSource Corporate Services Company where he represents Columbia Gas of Virginia before the SCC. Jim currently serves as Chair of the Administrative Law Section of the Virginia State Bar.*

# National Regulatory Conference Turns 25 Years Young

Twenty-five years ago, while some of us were trudging through middle school and trying in vain to understand the basic concepts of algebra, SCC Commissioner Preston Shannon brought Virginia's energy practitioners to Williamsburg for the first National Regulatory Conference (the "NRC"). This Spring (May 22-23, 2007, to be exact), the NRC will celebrate its silver anniversary with the return of Judge Shannon and several other former Commissioners to Williamsburg.

While we are still in the planning process, we anticipate that the Former Commissioners' Panel will kick off the conference. We will afford the *Commissioners* ample time to reflect on the history of the NRC, prior case decisions, changes in the industry, or simply to share good old fashioned war stories. This one panel, by itself, should make this year's NRC a can't-miss event.

Of course, other panels and activities are in the works as well. Your planning committee is considering a panel that will address infrastructure in Virginia, and will attempt to answer the age-old question of why it is so darn difficult to get anything built in the Commonwealth. Panelists are expected to address electric transmission siting, natural gas pipelines, and perhaps wind towers and other infrastructure projects.

We also are considering a panel related to incentive rate regulation, which is an issue that this Commission is addressing on a more frequent basis, as well a panel related to electric restructuring in surrounding states and what, if anything, Virginia can learn from those states. The committee will keep a watchful eye on the General Assembly as it tackles certain proposed legislation regarding electric restructuring and will most likely incorporate any new legislation into the discussion in May.

As always, the NRC will include at least one telecom-specific panel. As of this writing, the committee is considering a panel devoted to carrier of last resort obligations in a broadband world. Finally, we are planning an ethics panel that should be different from any other ethics panel at the NRC and which should send participants flying through two hours' worth of mandatory CLE.

Last year, we implemented a few new features that were well-received. For instance, we are moving away from the standard power-point presentations and into more give-and-take, question-and-answer discussions with panelists. We also began serving box lunches to those who remained for the ethics panel. We will continue these new features and we welcome your thoughts on other ways to continue to improve the conference. Please feel free to contact Brian Greene ([bgreene@seltzergreene.com](mailto:bgreene@seltzergreene.com); 804.672.4542) with any thoughts or suggestions.

We hope everyone will mark their calendars for May 22-23, 2007, for what promises to be a terrific 25<sup>th</sup> anniversary of a conference that has been, from its inception, truly wonderful.

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## Administrative Law News

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# Message from the Chair

As we enter the new year, the Administrative Law Section of the Virginia State Bar is actively engaged in the production of various informative CLE programs, including the Section's co-sponsorship of the annual National Regulatory Conference in cooperation with the Virginia State Corporation Commission ("SCC") and the College of William and Mary's Marshall-Wythe School of Law.

This year marks the 25<sup>th</sup> National Regulatory Conference ("NRC"). The organization of this year's NRC is led by program chair Brian Greene and an impressive committee of professionals who are regularly involved in matters before the SCC. The NRC also receives the invaluable guidance and assistance of Mary Council and Laura Martin with the SCC, who promise a few surprises during this year's anniversary. A preview of what is in store at the upcoming NRC is provided on the opposite page. Please mark your calendars for Tuesday, May 22<sup>nd</sup> and Wednesday, May 23<sup>rd</sup> and plan to join your colleagues at this very special event.

Ashley Beuttel has taken over as the Newsletter Editor, following the leadership of Brian Greene over the past two years. The current edition of the *Administrative Law News* marks the first of two newsletters scheduled to be published during the 2006-2007 year. Ashley is currently soliciting articles for the Spring edition of the newsletter. If you have any ideas for a future article or if you would like to volunteer to write an article for the next *Administrative Law News*, please contact Ashley at [abeuttel@oag.state.va.us](mailto:abeuttel@oag.state.va.us).

Kiva Pierce, the Secretary of the Administrative Law Section, is working with the Corporate Counsel Section and the Antitrust, Franchise and Trade Regulation Section to produce a Continuing Legal Education program on issues that keep counsel up at night. The jointly sponsored CLE program will be held from 11:00 am to 12:30 pm on Friday, June 15, 2007 at the Virginia State Bar Annual Meeting in Virginia Beach. The Administrative Law Section appreciates the efforts of Doug Callaway of the Corporate Counsel Section, who has taken the lead in developing this year's CLE program.

*Jim Copenhaver is Lead Counsel with NiSource Corporate Services Company where he represents Columbia Gas of Virginia before the SCC. He has over 25 years of regulatory experience in the energy field. Jim received his BS Degree and JD Degree from West Virginia University.*

Cliona Robb, the Section's Immediate Past Chair, is organizing the Section's annual Brown Bag lunch program, which is tentatively scheduled for early Spring 2007. The program will include a legislative update from Ken Schrad, Director of the Commission's Division of Information Resources. Please keep an eye out for details on this annual update, which promises to be interesting and educational.

I would also like to express the Administrative Law Section's appreciation to Cliona Robb for her guidance of the Section over the past year. The Section's activities and accomplishments have grown in large part due to Cliona's vision and leadership. During the past year, Cliona, Jo Nolte and Allison Held organized a special event recognizing the retirement of Commissioner Miller. Jo Nolte also organized an engaging Brown Bag Lunch program welcoming the appointment of Commissioner Jagdmann as well as an enlightening Brown Bag Lunch conversation with Commissioner Christie. The Section's website was also updated to include the complete text of all current and past articles of the *Administrative Law News* and the programs for every National Regulatory Conference. Thanks go to "webmaster" Mike Quinan. During Cliona's tenure, the NRC also experienced a shift in format to more interactive panels that encourage greater audience participation. The interactive panel concept was well received and is expected to continue with future NRCs.

Cliona also presided over the Administrative Law Section's Annual Meeting in Williamsburg, Virginia during the National Regulatory Conference in May 2006. This was the first Annual Meeting of the Section to be held in conjunction with the NRC since the Section's bylaws were amended in 2005 to permit this change in venue. The primary business conducted during the Annual Meeting included the election of the Section's current officers and two new Board members. The move proved to be a success based on the marked increase in attendance and participation over recent years.

Finally, I would like to thank Catherine Huband, the Virginia State Bar liaison to the Administrative Law Section, for her continuing assistance over the past year. Catherine's efforts have clearly contributed to the success of the activities and publications sponsored by the Administrative Law Section.

# Commission Rules on Dominion's Coal Fired Plant Plans

On June 30, 2006, Dominion Virginia Power ("DVP") filed a petition with the State Corporation Commission, docketed as Case No. PUE-2006-00075, seeking certain preliminary assurances in advance of moving forward on its proposal to build a new coal-fired generation facility in Virginia's coalfield region, near St. Paul in Wise County, Virginia. The petition was filed pursuant to the terms of Virginia Code § 56-585, wherein the General Assembly had amended the Virginia Utility Restructuring Act with regard to such construction.

In its petition, DVP emphasized that it was not now seeking approval of construction. For now, all that DVP sought was a ruling from the Commission that: (1) approved the calculation and implementation of an "Allowance for Funds Used During Construction" ("AFUDC") rate during planning and construction; (2) approved a set rate of return during commercial operation; and (3) exempted DVP from portions of the electric utility bidding rules found in the Commission's regulations.

There were a number of intervenors, of which the most vocal in its opposition was the Virginia Committee for Fair Utility Rates ("VCFUR"). The VCFUR filed a motion requesting that the Commission dismiss the petition because: (1) it seeks only an advisory opinion; and (2) it is asking for relief that the Commission could not legally grant. The Commission assigned the case to Chief Hearing Examiner Deborah V. Ellenberg.

On September 15, 2006, Judge Ellenberg issued a ruling recommending that the Motion to Dismiss be granted.

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Judge Ellenberg also immediately certified that ruling to the Commission. The Commission set a date to receive written comments on the ruling and elected to keep the date of the scheduled hearing as an opportunity to receive public comments. Written comments objecting to the ruling were filed by Appalachian Power Company, the Office of the Attorney General's Division of Consumer Counsel, and Dominion Virginia Power; the VCFUR and Commission Staff provided comments supporting the ruling.

The Commission's *Final Order*, issued November 1, 2006, addressed several points but generally found DVP's petition to be premature and therefore granted the Motion to Dismiss. In response to Staff's argument that the Commission should evaluate a petition filed pursuant to §56-585.G under a separate public interest standard, the Commission concluded that the proposed facility clearly is in the public interest because the General Assembly said so. According to the Commission, the plain language of the statute, as approved by the General Assembly, means what it says, that construction of a coal-fired generation facility which utilizes Virginia coal and is located in the coalfield region is in the public interest.

The Commission also authorized DVP to accrue AFUDC, eventually to be recovered through electric rates if the proposed plant is built. This, the Commission held, also was consistent with the statute promoting the construction of a coal-fired plant, which assures any distributor building such a plant that it shall have the right to recover its costs, including AFUDC, through its default rates for service. Referring to this same provision, the Commission recognized that the statute also calls for a fair rate of return on such an investment, but declined to set a rate of return at this time. The Commission found that while the General Assembly could have prescribed a rate of return, it must have an evidentiary basis for such a determination, which requires consideration of a complete record, including information on the ownership, specific cost data, projected cash flows, and financing mechanisms. In addition, a fair rate of return, along with AFUDC, could be finally determined only in the context of the company's revisions to its plan for default service rates.

— continued on page 10

# Office of Attorney General Releases Annual Report on the Status of Stranded Costs

On September 1, 2006, the Division of Consumer Counsel of the Virginia Office of the Attorney General (“Consumer Counsel”) released its annual Report on the Status of Stranded Cost Recoveries by Virginia Incumbent Electric Utilities (“Report”) for the period of 2001 through 2005. Consumer Counsel prepared the Report at the direction of the Commission on Electric Utility Restructuring (“CEUR”) which required an initial status report of stranded cost recovery for Virginia’s incumbent utilities by September 1, 2004, with annual status reports to follow until the end of the capped rate period set forth in Virginia Electric Utility Restructuring Act (“Restructuring Act”). This Report is the third annual report and covers the period from the commencement of capped rates on January 1, 2001, through December 31, 2005. It evaluated sixteen utilities, four investor-owned utilities and twelve electric cooperatives.

Consumer Counsel used the same “Accounting Approach” that it had used in the prior two reports to the CEUR. They compared the potential stranded cost exposure of the utilities for a particular year to the cumulative stranded cost recoveries. This method is intended to assess the extent to which capped rates are providing for stranded cost recovery, as well as to identify the potential exposure for stranded costs in the future.

The Report found two key inputs to the calculation of the potential stranded cost exposure for 2005, the unbundled generation revenue requirement and the generation market prices. The unbundled generation revenue requirement for each utility was determined as it would have under traditional regulatory methods prior to the Restructuring Act. The generation revenue requirement assumed a “Base Case” scenario where the

Return on Equity was 10% for the investor-owned utilities and 2.0 Times Interest Earned Ratio for the electric cooperatives. The Base Case scenario yielded a total Virginia jurisdictional cumulative stranded cost recovery of \$1.44 billion for the 2001-2005 period.

The second key input, generation market prices, was evaluated under two scenarios. Consumer Counsel used a Virginia State Corporation Commission-approved market price of 5.45 cents per kilowatt-hour (“kWh”) and also an updated 2005 market price of 6.82 cents/kWh. Both of these generation market prices were applied to the Base Case scenario. Using the 5.45 cents/kWh market price, the Report found total Virginia jurisdictional stranded cost exposure for 2005 to be about \$388.39 million. In contrast, using the 6.82 cents/kWh market price, the total Virginia jurisdictional stranded cost exposure for 2005 is estimated to be \$0.

At the request of Consumer Counsel, Dominion Virginia Power (“Dominion”) provided information regarding its efforts to mitigate its stranded cost exposure. Dominion reported mitigation expenditures totaling \$1.25 billion for the 1998-2005 period, with resultant estimated savings of \$236 million per year.

Consumer Counsel concluded that the stranded cost exposure of Virginia’s incumbent electric utilities remains “significantly dependent” on future generation market prices, generation revenue requirements including authorized returns, and the extent to which a competitive retail market develops. In addition, the Report found that even “relatively modest” changes in the generation market prices and authorized returns have significant impact on stranded cost recovery and exposure. Consumer Counsel presented the Report to the full CEUR in mid-December, 2006.

*Vishwa Bhargava Link is a Senior Counsel in the Law Department of Dominion Resources Services, Inc. In her prior positions, she was a Senior Attorney for MCI Telecommunications, Inc. and an Assistant General Counsel in the General Counsel's Office of the State Corporation Commission.*

# Telephone Directory Distress — PUC-2005-00007

By its Order Establishing Investigation dated January 21, 2005, the Virginia State Corporation Commission (“Commission”) initiated an investigation into the significant ongoing incidences of directory errors and omissions in the White Page directory listings of Verizon Virginia Inc. and Verizon South, Inc. (collectively, “Verizon”).<sup>1</sup> Interested parties were invited to file comments and more than 400 comments were received prior to the cut-off date.

The Commission Staff filed a Status Report on August 31, 2005, indicating that it had received and reviewed comments from customers<sup>2</sup> and several competitive local exchange carriers, held meetings with Verizon and VIS, reviewed the directory processes, interviewed customers, and consulted with other telephone companies responsible for directory publications. Though the analysis was not yet complete at that juncture, the Commission Staff “had analyzed sufficient information to suspect that Verizon’s white pages directory listing problems are largely Virginia-specific and are the result of a ‘perfect storm’ of events.” Staff explained that several factors contributed to the directory problems including (i) the merging of Bell Atlantic and GTE’s directory operations, (ii) converting of directory related computer systems, (iii) cumbersome processes for both wholesale and retail listings, and (iv) human error.

On September 7, 2006, the Commission Staff filed its Report of the Division of Communications (“Report”) and together with Verizon, a Joint Motion to Approve Offer of Settlement. The Report stated that 483 comments were filed in the proceeding of which 236 reported errors in listings, 150 reported omitted listings, and 149 reported that directory problems had occurred for more than 1 year. The Report stated that Verizon had cooperated with the Commission Staff during the investigation and that the Commission Staff felt that the corrective actions undertaken by Verizon in conjunction with the corrective action plan contained in the proposed Offer of Settlement, with the Commission’s monitor-

ing, should lead to better quality and accuracy in the directory listings.

The Offer of Settlement includes, among other things, a corrective action plan and an incentive plan. As part of the corrective action plan, Verizon would place \$2 million into an escrow account to be paid to affected customers. As part of the incentive plan, Verizon would agree to an ongoing directory listing accuracy rate of 99%. During the 3 years following the Commission’s acceptance of the proposed settlement, the Commission Staff would audit 80 Verizon directories of its choosing. For each audited directory that failed to meet the metric, as determined by service affecting errors or omissions, Verizon would have to pay \$50,000 to the Treasurer of Virginia. Service affecting errors are determined by several criteria including complete omission of a listing, publication of a listing that was either non-listed, non-published, or no longer in service, reversal of first/last name, and misspelling of listed name, incorrect number, or any other error so as to make it unlikely that a user could locate the listing in the expected alphabetical location or locate the correct number for the listing.

On September 29, 2006, the Commission Staff filed its Proposed Procedures for Implementing Verizon Corrective Action Plan outlining the processes for filing claims and distributing the \$2 million to affected customers. The Commission issued an Order for Notice and Comment on October 4, 2006, which provided opportunity for interested persons to file comments on or before December 1, 2006. The Office of Attorney General, Division of Consumer Counsel, NTELOS, The Free Land-Star, and various types of Verizon customers filed comments. Commission Staff and Verizon filed replies to those comments on December 21.



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<sup>1</sup> Verizon Information Services (“VIS”), a subsidiary of Verizon Communications Inc., is responsible for publishing the directories at issue in Virginia.

<sup>2</sup> The author was tasked by the Editor with writing this article even though she filed a formal comment regarding her residential listing in the directory in this proceeding.

# Telecom: Revised Rules Governing Disconnection Adopted

The Commission recently adopted revised Rules Governing Disconnection of Local Exchange Telephone Service, 20 VAC 5-413-10 *et seq.*, that apply to all Virginia certificated local exchange carriers. The regulations contain the requirements and circumstances under which telephone companies may disconnect their customer's local exchange and long distance services for non-payment. The revised regulations recognize and incorporate changes in the telecommunications marketplace since the regulations were originally approved on May 10, 1999.

The revised regulations reflect a number of changes

*Allison L. Held, Esquire is Assistant to Chairman Christie at the Virginia State Corporation Commission.*

suggested by parties and the Staff of the Commission and include incorporation of definitions, certain clarifications or modifications, and rules and procedures the Staff believed were required to provide due process and to assure customer notification prior to disconnection.

The revised regulations include identification and treatment of bundled services, requirements on customer notification before disconnection of service, resolution of customer billing disputes, and a customer's responsibility to pay for certain identified fees and surcharges. The revised regulations also contain a mechanism for local exchange carriers to petition the Commission for recovery of other fees and surcharges in addition to those identified in the regulations.

## Regulatory Lawyers Reflect on Ethical Issues

Recently, Virginia lawyers with administrative practices were given the relatively uncommon opportunity to attend an ethics workshop focusing on issues of professional conduct in the context of a regulatory practice. In fact, they were given that opportunity twice. The workshop, entitled "Practicing Law in a House of Mirrors," was presented both at the National Regulatory Conference on May 12, 2006 in Williamsburg, and again at the Virginia State Bar Annual Meeting on June 16, 2006 in Virginia Beach.

The workshop addressed the dilemmas posed by shifting alliances and latent conflicts when representing multiple parties. The factual hypotheticals included regulatory

enforcement actions, utility rate cases, facility certification applications, and industry lobbying groups.

Ford Stephens of Christian & Barton served on the panel in both locations. He was joined in Williamsburg by Tony Gambardella of Woods Rogers and Judge Alex Skirpan from the SCC's Office of Hearing Examiners. The other panelists in Virginia Beach were Tom Slater of Hunton & Williams and Judge Walter Kelley from the United States District Court, Eastern District of Virginia. Mike Quinan of Christian & Barton served as moderator in both locations.

## Virginia Natural Gas *(continued)*

On July 1, 2005, VNG filed an Application for approval of a PBR pursuant to Virginia Code §56-235.6. The Application included a general rate case filing, wherein VNG asserted that it was entitled to a \$19.2 million annual increase in its non-gas rates and charges.<sup>5</sup> Under the proposed PBR, VNG would freeze non-gas base rates for five years, forgo the recovery of the \$19.2 million rate increase throughout the five-year PBR period and, at the end of the PBR period, would agree to permanently forgo recovery of the unrecovered portion of a \$166 million acquisition premium associated with the purchase of VNG by AGL Resources, Inc. (“AGL”).

The Commission docketed VNG’s Application for approval of a performance based ratemaking methodology (the “PBR Application”) as Case No. PUE-2005-00057.<sup>6</sup> The Commission also docketed, as a separate proceeding, VNG’s general rate case filing (the “General Rate Case Filing”) as Case No. PUE-2005-00062.<sup>7</sup> The Commission ordered that evidence be received in the PBR Application and the General Rate Case Filing concurrently.

During the course of the proceedings, VNG’s PBR proposal was modified by a Stipulation among certain stakeholders that included a VNG commitment to pursue the construction of a \$48 - \$60 million pipeline across the James River/Hampton Roads Channel that would provide additional capacity to VNG’s southern distribution system by connecting VNG’s northern and southern systems. VNG also agreed to release certain low cost natural gas during the 2005-2006 winter heating season. The Stipulation was supported by VNG, AGL, the Office of the Attorney General, Division of Consumer Counsel (“Consumer Counsel”), the Virginia Industrial Gas Users’ Association (“VIGUA”), and several other commenting parties.

The Hearing Examiner issued separate reports in the PBR Application and the General Rate Case Filing on February 3, 2006 and May 18, 2006, respectively. The Commission issued an Order on July 24, 2006 addressing both proceedings concurrently. While VNG, Consumer Counsel and VIGUA had asserted that the Commission could approve the PBR Application without addressing the issues raised in the General Rate Case Filing, the Commission rejected this argument, finding that a ruling on the General Rate Case Filing was necessary because it “(1) is a rate investigation initiated at the Commission’s direction; (2) is directly related to the PBR Plan application; and (3) will be necessary to establish just and reasonable rates in the

event the PBR Plan as modified herein is not in effect.”<sup>8</sup> The Commission emphasized that the PBR could be withdrawn by VNG before acceptance or it might be discontinued after acceptance by VNG.

With respect to the General Rate Case Filing, the July 24, 2006 Order adopted in part, and rejected in part, the Hearing Examiner’s findings. The Commission, *inter alia*, rejected the Hearing Examiner’s recommended allowance of a \$156.1 million acquisition adjustment associated with the purchase of VNG by AGLR.<sup>9</sup> The Commission found that under traditional cost of service methodologies, VNG’s rates would be subject to a \$9.83 million annual reduction. Moreover, the Commission determined that “[i]n the absence of an approved performance based ratemaking methodology under §56-235.6 of the Code, VNG’s rates ‘shall be considered to be just and reasonable’ only if established in accordance with the revenue requirements and rate design found just and reasonable by the Commission in this Case No. PUE-2005-00062.”<sup>10</sup> Thus, if the PBR were withdrawn or discontinued, the rates determined in the General Rate Case Filing would go into effect.

With respect to the PBR Application, the Commission authorized a PBR that would: (1) freeze VNG’s then current non-gas base rates for five years, commencing August 1, 2006; (2) require VNG to construct a \$48 - \$60 million pipeline crossing the James River/Hampton Roads Channel, thus permitting the physical flow of gas from VNG’s northern distribution system to its southern system; and (3) require VNG to submit quarterly progress reports to the Staff relating to VNG’s compliance with the conditions of the PBR and progress on completion of the pipeline project.<sup>11</sup> The Commission found persuasive the significant public and customer support for the PBR plan.<sup>12</sup>

— continued on next page



5. *Application of Virginia Natural Gas for approval of a performance based rate regulation methodology* pursuant to §56-235.6, Case No. PUE-2005-00057.

6. *Id.* July 14, 2005 Order for Notice and Hearing.

7. *General Rate Case Filing of Virginia Natural Gas, Inc. for investigation of justness and reasonableness of current rates, charges, and terms and conditions of service in compliance with prior Commission Order*, Case No. PUE-2005-00062, July 14, 2005 Order for Notice and Hearing.

8. *PBR Application and General Rate Case Filing*, July 24, 2006 Order at 7.

9. *Id.* at 13-19.

10. *Id.* at 20 (footnote omitted).

11. *Id.* at 20-21.

12. See *id.* at 22-23.

## Virginia Natural Gas *(continued)*

The Commission also found that the PBR Plan “satisfies the statutory requirements of §56-235.6 B that the PBR: (i) preserves adequate service to all classes of customers, including transportation-only customers; (ii) does not unreasonably prejudice or disadvantage any class of gas utility customers; (iii) provides incentives for improved performance by the gas utility in the conduct of its public duties; (iv) results in rates that are not excessive; and (v) is in the public interest.”<sup>13</sup>

Significantly, the Commission determined that the “not excessive” standard of §56-235.6 B is not synonymous with the “just and reasonable” standard set forth in §56-235.2 A.<sup>14</sup> Although an evaluation of rates under the traditional “just and reasonable” standard would yield a \$9.83 million annual rate reduction, the Commission recognized that the PBR Plan “will not result in excessive rates when compared to the benefits thereunder and VNG’s cost of service.”<sup>15</sup> The Commission specifically cited the benefits of the \$48 - \$60 million investment in a pipeline linking VNG’s northern and southern systems, the associated reductions in the annual costs of gas to VNG’s firm and interruptible customers, and the lower long term costs of constructing the pipeline when compared to alternatives.

In approving the PBR, however, the Commission rejected certain stipulated elements of the modified PBR proposal. The Commission determined that provisions allowing VNG and other parties to independently or mutually terminate or modify the PBR during the five-year plan were not in the public interest. The Commission eliminated provisions relating to short-term reductions of gas costs because they had already been implemented. The Commission did not authorize certain revisions to delivery service tariffs that could be implemented in the absence of a PBR. The Commission eliminated provisions requiring the parties to agree to a specific schedule for the pipeline construction. The Commission also rejected provisions allowing VNG to adjust base rates in connection with changes in taxes imposed by the Commonwealth or for financial distress beyond VNG’s control, citing VNG’s ability to seek modifications to base rates as a consequence of tax changes or emergency circumstances pursuant to Va. Code §56-245.<sup>16</sup>

The Commission also addressed circumstances under which the Staff or an interested party might petition the Commission to terminate the PBR in accordance with Va. Code §56-235.6 C. The Commission noted that, in conjunction with any such proceeding, it could make existing

base rates interim and subject to refund effective no earlier than the initiation of such proceeding, pending the outcome thereof.<sup>17</sup> Moreover, the Commission indicated that “[i]f the PBR Plan is withdrawn or terminated, and absent a subsequent rate case or performance based ratemaking methodology, VNG’s rates shall be established in accordance with the revenue requirements and rate design found just and reasonable by the Commission under §56-235.2A of the Code in Case No. PUE-2005-00062.”<sup>18</sup>

Finally, the Commission concluded that a PBR could create incentives for a utility to reduce expenses in a manner that could impact service to customers and emphasized its expectation that VNG’s service and reliability remain at or exceed present levels during the five-year PBR period, consistent with the statutory requirements of a PBR.<sup>19</sup>

VNG notified the Commission of its acceptance of the terms of the PBR on August 4, 2006.

Additional applications for approval of PBR methodologies are now pending before the Commission for Columbia Gas of Virginia, Inc.<sup>20</sup> and Washington Gas Light Company.<sup>21</sup>

**Editor’s note: At the time of publication, the SCC had approved a PBR for Columbia Gas of Virginia, Inc. See [supra](#) n.20, Final Order (Dec. 28, 2006) available online at the SCC’s Case Docket Search Website.**



<sup>13</sup> *Id.* at 22.

<sup>14</sup> *Id.* at 23.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 21-22.

<sup>17</sup> *Id.* at 26.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Application of Columbia Gas of Virginia, Inc. For approval of a performance based rate regulation methodology pursuant to Va. Code §56-235.6*, Case No. PUE-2005-00098 and *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte, In Re: Investigation of the justness and reasonableness of current rates, charges and terms and conditions of service*, Case No. PUE-2005-00100.

<sup>21</sup> *Application of Washington Gas Light Company For a general increase in rates, fees and charges and revisions to the terms and conditions of service and for approval of a performance-based rate regulation methodology under Va. Code § 56-235.6*

## 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](http://www.vsb.org)), click on "member resources," then "sections," then "administrative law."

## Dominion's Coal Fired Plant Plans *(continued)*

With regard to the electric utility bidding rules, the Commission found that it had the authority to exempt DVP from certain bidding rules, but ruled it could not do so until DVP actually filed a petition to construct the plant.

Therefore, while providing DVP some guidance as to its rights under Code § 56-585, the Commission found that it could not make the rulings requested by DVP absent receipt of an actual application for approval of a request to

construct a facility meeting that section of the Code. DVP's petition was procedurally dismissed without prejudice to an eventual filing by DVP to build a coalfield coal-powered generation plant. DVP was allowed twelve months to return to the Commission with a petition to build the plant or it must cease booking AFUDC.

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