Administrative Law News

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THE 30TH NATIONAL REGULATORY CONFERENCE WILL BE HELD MAY 17-18, 2012

(BE SURE TO MARK YOUR CALENDARS)

Again next spring, we will gather in Williamsburg for the 30th annual NRC. As in the past, the conference will feature a keynote address, four interesting panel discussions, and a two-hour ethics CLE session. The day and a half conference will be held at the William & Mary School of Law on **May 17-18, 2012**.

Our panels will cover diverse topics. They will address current issues in the areas of utility mergers, electric transmission, distributed generation and telecommunications. As always, our panels will present topical information in a format that encourages "give and take" between expert panelists.

So, be on the lookout for further information and make plans to join many of your fellow Administrative Law Section members in Williamsburg May 17-18.

ABOUT THE EDITOR Ashley B. Macko is Counsel in the Energy and Environmental Department at McGuireWoods LLP in Richmond, Virginia. Before joining McGuireWoods in 2011, she served for six years as an Assistant Attorney General within the Division of Consumer Counsel, Office of the Attorney General of Virginia. Prior to that, she worked in private practice for a large law firm. She has experience in administrative and regulatory law matters including electric, natural gas, telecommunications, water and insurance issues. She received her J.D. from the University of Richmond and her undergraduate degree from Wake Forest University.

Supreme Court answers age-old question of whether FOIA applies to SCC, finds that it does not

By Ashley B. Macko

Twenty-two years after deciding *Atlas Underwriters, Ltd. v. State Corporation Commission*, the Supreme Court of Virginia has held that the State Corporation Commission ("Commission") is exempt from the Virginia Freedom of Information Act ("VFOIA") in *Christian v. State Corporation Commission* (Record No. 102477, decision issued November 4, 2011). The Supreme Court did not reach the issue in the *Atlas* case, having found the Circuit Court correctly determined that it lacked jurisdiction to compel the Commission to comply with the VFOIA.

In the *Atlas* case, the appellants sought a writ of mandamus from the Circuit Court against the Commission directing it to provide access to certain internal Commission documents. The Circuit Court held that Va. Code § 2.1-346, which invokes the Circuit Court's jurisdiction to hear VFOIA cases, was not constitutional as applied to the Commission because of the provision of the 1971 Virginia Constitution which conferred exclusive appellate jurisdiction over the Commission to the Supreme Court of Virginia. With respect to the application of the VFOIA to the Commission, the Supreme Court held that because it upheld the trial court's jurisdictional ruling, it would not consider the court's ruling on the question of whether the Commission is exempt from coverage of the VFOIA.

The facts in the *Christian* case were straightforward. Mr. Christian had submitted two letters to the Clerk of the Commission requesting information under the VFOIA. The Clerk, by counsel, responded nine days later (and more than five "working" days) that "your information requests pertain to data that is not readily available." Mr. Christian then filed a petition with the Commission alleging the Clerk had failed to provide the requested public records and requested attorney's fees and costs. The Commission subsequently entered an order dismissing the petition on the grounds that "no actual controversy exists in this matter given the Clerk's Office's timely response to the Petitioner's Request for records." The Commission did not reach the question of whether the VFOIA was applicable the Commission. Mr. Christian then appealed to the

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PJM's Proposal to Integrate State-Driven Demand Response Initiatives Will Require More FERC Study

By Kenneth A. Barry

Many states have been fostering demand response by encouraging their retail electric utilities to invest in "smart" metering and communications devices and to promote "dynamic" tariffs with price signals that give consumers incentives to flatten their loads. PJM embraced these trends in a September 23, 2011 FERC filing to adjust its own rules to better accommodate these state-driven developments.[1] Meanwhile, PJM's own program for compensating "economic" demand response offers at the wholesale level – spurred by a Federal Energy Regulatory Commission (FERC) ruling on national policy in Order No. 745[2] -- leaves unsettled just how the abundance of intersecting programs will work together.

The plot inched forward in mid-December as a result of two FERC decisions. On December 14, FERC held that, while PJM's September 23 proposals were "important" and "innovative," the concerns raised by a host of intervenors signaled that the issues were too complicated to be resolved on the basis of pleadings alone.[3] Hence, FERC suspended the proposals for five months[4] while directing staff to arrange a technical conference to probe the matter more fully. On December 15, FERC held that PJM was mostly on the right track in implementing Order 745's previous directive that all organized wholesale spot energy markets (i.e., those run by RTOs and ISOs) must begin paying demand response providers the *full LMP* for cost-effective offers that clear in the hourly markets.[5] However, that order tasked PJM to go about some fine-tuning on its implementation of Order 745.

Given the high stakes for success, both at the Federal and state level, of policies for stimulating demand response to help curb short-term wholesale electric market spikes and reduce the long-run need to build more infrastructure to meet peak loads, this article will focus on PJM's "innovative" September 23 proposals to better integrate its processes with state programs and the nettlesome problems still to be worked out.

PJM explained that the proposed reforms to its own rules impacted both its *capacity market* (which goes by the acronym "RPM"[6]) and its *energy markets* (both the day-ahead and real-time spot markets). It would accommodate what it referred to as Price Responsive Demand ("PRD") either to reduce the level of any Load Serving Entity's ("LSE's") RPM target *or* to compete with conventional resource bids into its energy markets. The seams between the two, as will be seen, created fodder for complaint by some intervenors.

The benefits to the wholesale market from encouraging and integrating state PRD programs were manifold, according to the filing. PJM enumerated among these: (i) reducing the need to construct more generation and transmission facilities by slowing peak demand growth; (ii) improving existing asset utilization (thus reducing overall costs); (iii) enhancing short-term reliability by reducing the frequency and extent of energy shortage events; (iv) introducing "price elasticity" to the RTO's energy markets ; and (v) reducing some of the uncertainty associated with load forecasts. The specific proposals grew out of a two-year stakeholder collaborative, and no one opposed the proposal "outright," noted PJM.

The minimum "defining elements" of PRD under the proposal consisted of an end-user load with (a) delivery meters that record energy consumption over a one-hour period (or less); (b) supervisory control at the substation level capable of curtailing PRD load in response to a generation or transmission emergency;[7] and (c) a dynamic retail rate structure that changes the customer's costs in tandem with changes in the real-time, wholesale LMP. Recognizing that individual customers may want to "outsource" the handling of the details to a competent third party, the proposal defined a "PRD Provider" as either an LSE or an independent

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First Impressions: SCC's Price Determination for Gas Facilities

By Charlotte P. McAfee

In October, the Commission determined a price for the sale of natural gas facilities to the natural gas utility certificated to serve the territory in which the facilities are located. This was a case of first impression.[1]

Section 56-265.4:5 of the Code of Virginia provides that any company may make an "exempt" direct sale, transmission or service of natural gas to up to 35 commercial or industrial non-utility customers in an uncertificated territory upon first providing notice to the Commission. The exemption refers to Va. Code § 56-265.1(b)(4), which exempts providers of such natural gas services from the definition of "public utility," and the requirements for public utilities, set forth in the Utility Facilities Act, Va. Code § 56-265.1 *et seq.* If a natural gas utility subsequently acquires a certificate to serve the area in which a non-utility company is providing exempted natural gas services, then the utility has the right, "subject to existing contracts regarding gas service to such customers and to the gas utility's effective transportation tariff," to acquire the facilities installed to effect the exempt sale or service. If the utility and non-utility gas provider cannot agree on a price for the facilities, then a price is to be determined by the Commission.

Certain natural gas pipeline facilities located in Wise County, which serve the University of Virginia's College at Wise (UVA-Wise), were constructed by a non-utility owner/operator in 2001 pursuant to Va. Code § 56-265.4:5 and were acquired by another non-utility owner/operator, Paramont Energy, LC (Paramont), in 2005 for $300,000. In 2008, the Commission granted Appalachian Natural Gas Distribution Company's (ANGD) application to become the certificated provider of natural gas service in Wise County.[2] ANGD and Paramont participated in negotiation discussions for approximately a year before ANGD filed a petition under § 56-265.4:5 on November 9, 2009, requesting the Commission to determine a price for the facilities,[3] which make up only a portion of Paramont's non-utility natural gas facilities in Wise County. Paramont's customer Wal-Mart participated in the proceeding.

Section 56-265.4:5 does not provide any explanation or guidance as to how the Commission is to determine "a price" for the facilities. Several methods of valuation were proposed by ANGD, Paramont and Commission Staff. Valuation methods presented by ANGD included depreciated original cost to Paramont, replacement cost new of the actual components, replacement cost to ANGD of new facilities satisfying requirements applicable to the utility's operation, and depreciated replacement cost. Staff rejected a depreciated original cost approach because, although Paramont's cost to acquire the facilities in 2005 was available, the original cost of the facilities at the time of construction was unknown. Paramont provided a confidential valuation for the facilities supported by the expert testimony of a consultant with experience in the valuation of similar facilities, and in the geographic area of the facilities at issue. Using a replacement cost new less depreciation approach, Commission Staff recommended that the Commission determine an estimated value of $383,800 for the facilities. Both Paramont and the Staff also asserted, however, that, because continued access to the facilities would enable Paramont to continue to meet its contractual commitments, ANGD must have an effective transportation tariff, containing the rates Paramont would pay for such access, for the Commission to fully determine the value of those facilities to Paramont.

In his Report issued June 3, 2011, Hearing Examiner Howard P. Anderson, Jr., recommended that the Commission adopt Staff's recommended value of $383,800; that ANGD be afforded three months to file in a separate proceeding for Commission approval of a cost-based transportation tariff, using the recommended acquisition cost for the facilities; and that, once the tariff is approved, the Commission remand the valuation proceeding "for final valuation based on fair market value, transportation rates and the time remain-

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SCC Implements New Procedures for Court Reporting Services

By Emily O. Wingfield

The State Corporation Commission has implemented new procedures for court reporting services and the provision of transcripts. Effective October 16, 2011, the Commission entered into contracts with two companies to provide court reporting services for SCC proceedings. For hearings scheduled on and after that date, the Clerk's Office of the Commission assumed responsibility for making arrangements for reporting services. The costs associated with routine reporting and transcription services are borne by the Commission and transcripts of proceedings are the property of the Commission.

The new procedures for court reporting services squarely align with the Commission's strategic plan and its guiding principles of providing excellent customer service to Virginians, creating more user-friendly processes and enhancing the availability of information.

Transcripts, including transcripts of proceedings held prior to October 16, are available to the public online at no charge, except for transcripts containing portions that are designated as confidential or extraordinarily sensitive. Generally, public portions of a transcript are anticipated to be available within 14 days after the conclusion of the proceeding. The transcript is posted as a case document and is available through the Docket Search portal of the Case Information page on the Commission's web site, www.scc.virginia.gov. Paper copies can be obtained from the Clerk's Office upon request and payment of the normal copy fee of fifty cents per page.

Parties who have entered into protective agreements and are thereby entitled to confidential or extraordinarily sensitive portions of a transcript will be provided with a paper copy of those portions of the transcript upon request and will not be charged the copy fee. Due to security constraints, the Commission is not making electronic versions of confidential or extraordinarily sensitive portions of transcripts available at this time.

Expedited and real-time transcription services are available for SCC proceedings upon timely request to the Clerk's Office and at a cost to the party ordering those special services. Expedited transcription services include the provision of an electronic version of the transcript of one day of a proceeding by 4:00 p.m. on the next business day thereafter, followed by a paper copy by 4:00 p.m. of the second business day thereafter. Real-time services include real-time transcription during the hearing as well as a "dirty" ASCII file at the end of the hearing day, with a certified transcript available within 14 days after the conclusion of the proceeding.

In order to secure a court reporter with the requisite skill and equipment to provide the requested service, requests for expedited transcripts and real-time transcription must be received prior to the day of the hearing. The key to obtaining such service is timeliness - Clerk's Office staff needs sufficient time to communicate with the court reporting company to schedule the service requested.

The party requesting either expedited or real-time transcription service will be billed by the Clerk's Office for the incremental cost of such service in accordance with the Commission's contracts with the court reporting companies. The party will be provided with a form to execute, which will specify the service requested, the rate of the incremental cost established by the Commission's contracts with the court reporting companies, and the party's agreement to pay that cost.

Court reporting services for proceedings outside of the Richmond area will also be secured by the Clerk's Office and will be subject to the same arrangements outlined above. However, depositions are not part of the contracts and reporting services for these matters will be coordinated by the Office of General Counsel on an as-needed basis.

Questions about the Commission's court reporting

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Two Uranium Studies Published – Illustrate the Challenges and Potential Benefits of Lifting Almost 30-Year Ban on Uranium Mining in Virginia

By Ashley B. Macko and Kristian M. Dahl

As noted in the December 2010 Edition of the Administrative Law News, at the request of the Uranium Mining Subcommittee of the Virginia Coal and Energy Commission, two studies were performed during 2011 on the potential impacts of lifting the nearly 30-year ban on uranium mining in Virginia. A large untapped uranium resource lies beneath Coles Hill in Pittsylvania County, Virginia, consisting of roughly 3,000 acres in the rural Piedmont region of Virginia. The deposit is estimated to contain 63.3 million pounds of minable uranium. The results of these studies were released in late 2011.

The first study was on the socioeconomic impact of uranium mining in the region surrounding the Coles Hill site in Pittsylvania County conducted by Chmura Economics and Analytics. The study was designed to broadly consider the net benefits from mining and milling uranium in the Commonwealth to provide a framework for the General Assembly to assess and balance the health and environmental risks against the economic rewards. Chmura found that the mining and milling operations would bring "substantial and much needed economic benefits to Pittsylvania County, the surrounding areas, and the state." Specifically, Chmura estimated that the Coles Hill site would support more than 1,000 jobs annually (direct, indirect and induced) and have annual net positive economic impact of approximately $135 million. According to Chmura, "[t]his net benefit comes after subtracting for a broad array of potential socioeconomic costs (such as the public health and environment) and negative 'stigma' effects on some sectors (such as tourism and agriculture), which under specific circumstances Chmura judges most likely to be minimal." Over the life of the operation, expected to be 35 years, Chmura estimates approximately $5.0 billion in net accumulated economic revenue for Virginia firms. Chmura bases these estimates on the assumption that the site will be operated and ultimately decommissioned within established federal guidelines, which, by law, reduce environmental and public health risks to the surrounding communities to near negligible levels. Chmura looked at four different scenarios involving varying environmental impact and also at varying levels of prices for uranium.

The National Research Council undertook the second study, designed to report on the scientific, environmental, human health and safety and regulatory aspects of mining and processing uranium in Virginia. This report did not focus on the Coles Hill deposit specifically nor was it designed to make a recommendation about whether or not uranium mining should be permitted in the Commonwealth. The report explained the future demand for uranium is dependant on the use of nuclear power as a power generation resource and noted that the United States produces 3% of global uranium and imports 92% of the uranium needed to fuel domestic nuclear reactors. Geological exploration has identified more than 55 occurrence of uranium in Virginia, but that so far only the deposit at Coles Hill is believed to be large enough to be considered potentially economically viable.

The report outlined the potential environmental and health risks associated with mining uranium, including both conventional mining risks as well risks associated with handling radioactive materials, stressing the need for long-term stewardship over the site once mining has been concluded. As a result of most uranium mining being undertaken in the United States in arid climates, the report found limited experience in the United States and Virginia in areas which have a positive water balance. The report included a listing of best practices that have been adopted in other

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"The E-RAC" - Commission approves first rate rider for recovery of costs of projects necessary to comply with environmental laws applicable to generation facilities

By Ashley B. Macko

On November 30, 2011, the State Corporation Commission approved a rate rider for Appalachian Power Company under Va. Code § 56-585.1 A 5 e. This was the first time the Commission has been called upon to approve an environmental rate adjustment clause, dubbed an "E-RAC" under the Regulation Act. Subdivision A 5 e allows a rider for "projected and actual costs of projects that the Commission finds to be necessary to comply with state or federal environmental laws or regulations applicable to generation facilities used to serve the utility's native load obligations. The Commission shall approve such a petition if it finds that such costs are necessary to comply with such environmental laws or regulations. . . ." Analogizing this rider to the rider available under Va. Code § 56-582 B (vi) (the "E&R statute"), Appalachian Power sought incremental recovery of environmental costs that were built into Appalachian's base rates, essentially a true-up for under-recovery of those costs.

Noting that Appalachian had previously sought and received Commission approval to recover certain environmental costs through base rates, the Commission found that "Va. Code § 56-585 .1 A 5 e does not require us to later supplement those approvals - which we granted by final order - or to transfer recovery of base rate costs to a rate adjustment clause." The Commission further explained "Indeed, for costs incurred following the expiration of APCo's capped retail rates on December 31, 2008, the Company has not cited any provision of the Code that requires the recovery of an environmental project's costs in two places (i.e., through both base rates and adjustment clause rates) in the manner the Company proposes. Nor does the Code suggest that our base rate decisions regarding environmental costs are mere placeholders subject to further modification through Va. Code § 56-585 .1 A 5 e."

The Commission approved the Staff's ratemaking methodology. As explained by the Hearing Examiner:

> Staff's methodology begins with the premise that the Commission sets prospective base rates at a level that affords a utility the opportunity to fully recover the costs used to formulate those rates. Some costs will inevitably fall while other costs will rise subsequent to the determination of base rates by the Commission. Regardless of whether there is an over- or an under- recovery, Staff s proposed methodology is based on the premise that the utility has had the opportunity, but is not guaranteed, to fully recover the costs, including environmental costs, upon which base rates were set.

Specifically, Staff's proposed methodology identified all environmental costs for projects that were not included in base rates during the test period and limited rider recovery to only those costs. Thus, Staff excluded the true-up of any environmental-related costs incurred by the Company prior to October 31, 2009. The end result was to approve a $38.5 million increase in revenues compared to the $77 million requested. Appalachian Power has filed a notice of appeal.

For additional information, see Case No. PUE-2011-00035. ❇

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

Supreme Court *(continued)*

Supreme Court of Virginia.

The Court first determined that an actual controversy existed based on the substance of the Commission response, that the records were not readily available, and the timing of the response which was beyond the five work day deadline set forth in the applicable section of the VFOIA. The Court opined that "the production of documents in the instant case does not resolve all of the issues raised in this appeal, namely, whether Christian is entitled to recover fees and costs under the VFOIA due to the SCC's insufficient original response. If Christian were to prevail on the merits, and the VFOIA were found to be applicable to the SCC, then the SCC would need to render a determination of the appropriate fees and costs under former Code § 2.2-3713. Because the production of the requested records by the SCC would render the issue of fees and costs moot only if the VFOIA were not applicable to the SCC, we must reject the SCC's finding that there was no actual controversy. We therefore must address, as an issue of first impression, whether the VFOIA is applicable to the SCC."

In its analysis of the applicability of the VFOIA to the Commission, the Supreme Court noted at the outset that while the VFOIA exempts certain records and certain governmental agencies, the Commission is not one of the agencies specified. Notwithstanding, the Supreme Court recognized that the prefatory language "[e]xcept as otherwise specifically provided by law . . ." contained in the VFOIA statute means that the statute does not necessarily require the VFOIA itself to confer an exemption, and is not dispositive of the question whether the Commission is subject to VFOIA.

The Supreme Court found the Commission's three primary arguments for the inapplicability of VFOIA to the Commission "compelling evidence that the legislature did not intend the VFOIA to apply to the SCC." First, the Commission pointed to the separate and parallel structure of laws specifically addressing the handling of information at the SCC. While first noting that the burden was on the public body to identify a conflicting law offering shelter from a VFOIA request and that the existence of some parallel or even contradictory statutes applicable to the SCC does not suffice as proof of an exemption, the Court was persuaded by the twenty-seven different statutory provisions governing information disclosure by the Commission.

Second, the Commission argued it was not a "public body" under the VFOIA based on its constitutional derivation. The Court cited its previous determination that the Commonwealth Attorney's Office is not a "public body" under the VFOIA because the definition of "public body" in VFOIA "clearly refers to entities to which responsibility to conduct the business of the people is delegated by legislative or executive action." Likewise, the Court concluded, the SCC is authorized by the Virginia Constitution and exempt from the VFOIA.

Finally, the Commission argued that the VFOIA lacks a constitutional enforcement mechanism under the holding in *Atlas* that the Circuit Court has no jurisdiction to enforce the VFOIA against the Commission. Finding this argument "the most persuasive," the Court rejected Mr. Christian's argument that enforcement could lie with the Supreme Court, based on the plain language of the enforcement provision, which confers that jurisdiction on the general district court or circuit court of the residence of the aggrieved party or the City of Richmond. The Court opined that "there is nothing in the VFOIA to suggest that the language in the enforcement provision . . . is anything less than exclusive." The Court further reasoned that although the VFOIA had been amended frequently since the decision in *Atlas,* no change had been made to the enforcement provision to address that holding. The Court further cited failed legislation that would have provided for the Supreme Court's enforcement of the VFOIA with respect to the Commission. Taking all of this together, the Court concluded that "the VFOIA therefore is functionally unenforceable against the SCC. As the SCC correctly points out, a policy with no constitutional enforcement provision has no legal weight." ✻

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

PJM's Proposal *(continued)*

commercial entity (*e.g.* "curtailment service provider" or CSP) acting as the interface between the load and the RTO. The PRD Provider would have to comply with a wealth of administrative and technical requirements, including a demonstrated ability to actually curtail load on 15 minutes notice of an "emergency." The reward for willingness to reduce load in a PJM-declared emergency would come in the form of "PRD Credits" reflecting the difference between an LSE's cost obligation in the RPM market with and without the collective curtailment commitments of PRD loads. To participate in the RTO's energy markets as an "economic" resource, a PRD Provider would be required to submit a "PRD Curve" that would delineate up to ten price/quantity pairings PJM could use to "dispatch energy." The PRD Providers would be required to have automatic control over the end-user loads to achieve the reductions described in the PRD Curve.[8]

Finally, PJM desired to phase in over four years the amount of PRD that could participate in the RPM capacity market by imposing a cap, to be allocated among the RTO's zones and sub-zones. This limitation would allow it to gain experience and, according to the filing, was also a necessary concession to stakeholders in order to gain a stronger consensus on the September 23 filing.

Some of the major hitches perceived by intervenors were as follows:

- ***Limitation on eligibility to receive PRD credits:*** While, as noted, PJM would recognize either traditional LSEs or independent CSPs as PRD Providers, it would only provide PRD Credits to LSEs (which, of course, are the direct beneficiaries of a reduced RPM capacity requirement). However, CSPs – which would have to negotiate with LSEs to get the monetary value of the credits from PJM – saw this as a structural handicap for their own business prospects.
- ***Choosing which program in which to participate.*** The proposal stipulated that an entity registering in a given year as a PRD load could not also participate in other PJM programs (e.g., in its energy market as an Economic Load Response). Nevertheless, PJM averred that its proposal, while adding a PRD option, does not "eliminate or detract" from any of the other demand response options in its existing market rules. Some intervenors, however, accused PJM of unreasonably restricting end users from participating as demand response in *both* types of markets – the RPM capacity *and* the day-ahead or real-time energy markets. For example, PJM ICC[9] posited that a PRD load that has committed to curtail if called upon under the RPM program should, in a *non-emergency* scenario, be permitted to offer demand response at lower prices specified in its PRD Curve in the hourly energy markets and receive the full LMP if cleared; indeed, PJM ICC suggested, *not* to provide this compensation would be incompatible with the Commission's directive in Order 745 to pay full LMP to all cost-effective demand response offers. Another intervenor contended that PJM appeared to be talking out of both sides of its mouth, calling attention to a May 2011 statement whereunder the RTO indicated a load could participate as PRD willing to curtail during an emergency event *and also* offer to reduce load during normal system conditions in the energy (or operating reserve) market as an "Economic [demand response] resource."[10] This engendered a rather theoretical debate about demand response as a "supply side" and a "demand side" product, with PJM retorting that a load cannot participate as both a "resource" (in the "supply-side" capacity market) and as a "demand-side" load adjustment in the energy market.[11]
- ***The need to rationalize or consolidate programs.*** Other intervenors saw a need for PJM to reduce the profusion of demand response programs and transition to the PRD as the "ultimate solution." PSEG thought that the

PJM's Proposal *(continued)*

more favorable treatment of demand response resources under existing PJM programs will deter participation in PRD.

- ***Phasing in, capping, and testing.*** Some state commissions questioned the logic or necessity of PJM's insistence on gradually phasing in the amount of PRD it will accept in the RPM market through a cap and allocation scheme. Others questioned the need to run annual tests on all PRD loads to see if they can curtail (sensing it will discourage participation by smaller loads).[12]

With so many knotty questions raised on both narrow and broad aspects of the PJM filing, FERC's December 15 Order did not hint how it might resolve the contested issues. Instead, it concluded the Order by declaring that PJM, when it comes to the technical conference, must address the intervenors concerns and provide "additional support" for its proposal. That support included a daunting list of ten specific issues on which PJM must be prepared. ❇

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

1. The slate of proposed changes impacted both PJM's Open Access Transmission Tariff (OATT), its Operating Agreement among participants, and its Reliability Assurance Agreement among Load Serving Entities (LSEs).

2. *Demand Response Compensation in Organized Wholesale Energy Markets,* Order No. 745, 76 FR 16,658 (March 24, 2011), FERC Stats. & Regs. ¶31,322 (2011); *order on reh'g,* 137 FERC ¶61,215 (2011).

3. *PJM Interconnection, L.L.C.*, 137 FERC ¶61,204 (2011)(hereafter, "the Order").

4. The order granted an effective date of May 15, 2012, at which time the modifications would theoretically go into effect subject to refund – although it is reasonable to expect substantive changes between now and then.

5. There are two critical terms of art here. Requiring RTOs/ISOs to pay "full LMP," which was the cornerstone of Order 745, means that a unit of demand response offered and accepted in an hourly energy market will receive, in compensation, the market-clearing Locational Marginal Price, *without* any deductions. Previously, PJM and other RTOs/ISOs have subtracted from full LMP the curtailing load's avoided generation or transmission charges. The "cost-effective" condition of Order 745 means in essence that there must be *net savings* to consumers (when the LMP-lowering effect of demand response is netted against the lost units of sale).

6. "RPM" stands for Reliability Pricing Model, under which the RTO requires load-serving entities (LSEs) to participate in an auction for forward capacity (assuming they do not have their own, or bilaterally contracted, capacity resources on which to depend).

7. The PRD could customize its emergency curtailment obligation by a price below which it could *not* be required to curtail as PRD load.

8. However, PJM related that only a load that has not committed as PRD in the capacity market could submit PRD Curves in the energy markets. See Order, P 23.

9. This acronym stands for the PJM Industrial Customer Coalition.

10. The intervenor, Viridity, believed that an end user could work with two different intermediaries – a PRD Provider and a CSP – and offer into both kinds of markets; but PJM, inconsistently, seemed to be blocking such dual participation in its own wholesale demand response programs.

11. PJM went to some effort to explain that, once load is deducted from an LSE's RPM obligation through a PRD commitment (as a "capacity" resource), no resources will be procured to meet that load in the day-ahead or real-time energy markets, because "this load is simply not in the market." Thus, a load that has committed to curtail itself as a surrogate for capacity in an emergency cannot participate as an "economic load response" offered into the energy markets. In short, PJM's view is that it can't work both sides of the street.

12. The testing requirement would apply if the load has not been curtailed within a year in a real emergency event. The opponents suggested a "statistically valid" but scaled-down approach to such testing.

Web Site News

The Section's home page on the Virginia State Bar's web site now provides a helpful bit of history, reflecting past developments in state regulatory law and the Section's efforts to keep its membership apprised of those developments. A comprehensive collection of Administrative Law News dating back to 1988 can now be accessed on-line. In addition, the programs of every National Regulatory Conference can be downloaded.

The Administrative Section home page can be found at http://www.vsb.org/sections/ad/index.htm Or, if it's easier, just go to the State Bar's web site (www.vsb.org), click on "member resources," then "sections," then "administrative law."

First Impressions (continued)

ing on the [UVA-Wise] contract."[4]

The Commission agreed with the valuation methodology originally offered by Staff and recommended by the Hearing Examiner, producing a value for the facilities of $383,800.[5] The Commission departed from the Hearing Examiner's recommendations in finding that ANGD was required by statute to have a transportation tariff in place before acquiring the facilities but not before filing an application for a Commission determination of value.[6] In its Order, the Commission stated that it did "not address wither the price determination under [§ 56-265.4:5] should be increased to reflect transportation charges that Paramont may incur" to fulfill its existing contractual obligations;[7] but that ANGD must have an effective transportation tariff on file with and approved by the Commission before it could acquire the facilities.[8]

On November 14, 2011, Paramont filed with the Commission notice of appeal of the Final Order to the Supreme Court of Virginia. ❇

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1. *Petition of Appalachian Natural Gas Distribution Company for a Determination of the Price for the Acquisition of Natural Gas Facilities Pursuant to Va. Code § 56-265.4:5 B*, Case No. PUE-2009-00125, Final Order at 8 (Oct. 12, 2011) (Order).
2. *Application of Appalachian Natural Gas Distribution Company for approval of a certificate of public convenience and necessity to provide natural gas service pursuant to § 56-265.3,* Case No. PUE-2007-00077, Final Order (Apr. 18, 2008).
3. Order at 2.
4. Hearing Examiner Ruling at 25-26.
5. Order at 10-11.
6. *Id.* at 9-10.
7. *Id.* at 11.
8. Id. at 10.

SCC Implements (continued)

procedures and requests for special reporting services should be directed to either of the Commission's bailiffs, Sherman McLaughlin, 371-9739, or Debbie Bell, 371-9946. General information regarding the Clerk's Office may be found at www.scc.virginia.gov/clk.

In addition to coordinating the changes to court reporting services, during the past several months the Clerk's Office has introduced additional online services available to business entities. Customers can use SCC eFile (https://sccefile.scc.virginia.gov) to form a Virginia stock corporation or limited liability company, perform registered agent changes and resignations, file corporate annual reports, pay corporate and LLC annual registration fees; obtain certificates of good standing for corporations and certificates of fact of existence or registration for LLCs; submit articles of amendment and restatement for Virginia corporations and LLCs and articles of cancellation for LLCs; file UCC financing statements and amendments; check business entity name distinguishability and perform basic business entity searches. ❇

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Two Uranium Studies (continued)

jurisdictions, including Colorado and Canada, that could be leveraged in Virginia. The Report concludes that there are "steep hurdles" to be overcome in order to protect the health and safety of workers, the public and environment.

Stay tuned. In mid-January, Governor McDonnell announced that he was asking the General Assembly to take no action to permit uranium mining during its 2012 session, calling instead for the continuation of the state's moratorium on uranium mining pending a comprehensive and on-site study of the issue to be completed by a newly-created multi-agency state workgroup. ❇

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

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