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Administrative Law News

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The "Prima Facie Case" and the Burden-Shifting Presumption: Does One Always Follow The Other?

By Mark C. Shuford and Lauren Tallent Rogers

Fans of the comedic fairy tale movie "The Princess Bride" will recall with a smile the self-proclaimed criminal genius Vizzini, who mutters the word "Inconceivable!" with increasing agitation each time one of his scheme's begins to go awry. Eventually, one of his henchmen turns to Vizzini and, in what has become an iconic line, tells him: "You keep using that word. I do not think it means what you think it means." The legal profession places high value on using words with precision, but we, too, can occasionally become like Vizzini, morphing words or legal terminology well beyond their original or intended meaning. This article explores whether this

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Cross-State Air Pollution Rule Vacated: A Lesson in Agency Overreaching

By Heather Stevenson and Neal Cabral

Many U.S. Environmental Protection Agency regulatory efforts have been criticized this year, but perhaps none so harshly as EPA's Cross-State Air Pollution Rule ("CSAPR"), which was vacated by the D.C. Circuit on August 21, 2012.[1] This rule focused on emissions from power plants and was designed to prevent upwind states from significantly contributing to air pollution in downwind states. The court specifically struck down the methodology EPA used to set the upwind state emissions reduction obligations (called emissions budgets), holding that EPA had exceeded its statutory authority in its development of these budgets.

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For the First Time, Virginia Supreme Court Interprets Provisions of the 2007 Electric Utility Regulation Act

By James G. Ritter

On November 1, 2012, the Supreme Court of Virginia decided two appeals taken from decisions of the State Corporation Commission by Virginia's two investor-owned incumbent electric utilities, Appalachian Power Company ("Appalachian") and Dominion Virginia Power ("Dominion").[1] Each appeal involved a question of first impression concerning proper interpretation of the Virginia Electric Utility Regulation Act enacted in 2007 ("2007 Act" or "Act").[2]

Appalachian Appeal

Appalachian appealed the Commission's 2011 decision approving its petition for an environmental rate adjustment clause.[3] Pursuant to § 56-585.1 A 5 e of the Code of Virginia ("Subsection A 5 e"), a utility may seek a rate adjustment clause to recover "[p]rojected and actual costs" of projects that are "necessary to comply with state or federal environmental laws or regulations applicable to generation facilities used to serve the utility's native load obligations."[4] Once approved, a rate adjustment clause must be combined with the utility's base rates if the Commission determines, as part of the biennial rate review process, that the utility's rates should be revised or that credits should be issued to customers.[5]

Appalachian's petition, the first of its kind under Subsection A 5 e, requested approval to recover two main categories of costs. The first consisted of costs incurred directly by Appalachian for its own environmental projects. The second included costs for environmental projects undertaken by Appalachian's affiliates that were embedded in the capacity equalization charges paid by Appalachian to the affiliates.[6]

The Commission denied recovery of a portion of the costs in the first category. Appalachian had previously requested and obtained approval for an opportunity to recover the costs in its 2009 and 2010 base rates. Having granted that opportunity, the Commission concluded that it was not required by Subsection A 5 e or any other provision of the 2007 Act to give Appalachian a "second bite at the apple." Specifically, the Commission found that because the statute "is silent on the intersection of base rate recovery and adjustment clause recovery of environmental costs," it was permitted to adopt a ratemaking methodology using its traditional ratemaking discretion under Chapter 10 of Title 56 of the Code.[7] The Commission also noted that its decision to exclude costs that the utility already had an opportunity to collect was consistent with another provision of the Act requiring it to consider rate adjustment clause petitions "on a stand-alone basis," without regard to the utility's other costs, revenues, investments, and earnings.[8]

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Many EPA Rules Appear Secure Following Presidential Election, But Some Questions Remain

By William T. Reisinger

Many utilities and generating companies have argued that some of the regulations promulgated by EPA in the last four years are too burdensome and fail to give the industry sufficient time to modernize their facilities. Meanwhile, some environmental advocates hope that the newly re-elected president will direct his EPA administrator to issue even tighter regulations of greenhouse gas ("GHG") emissions and natural gas extraction techniques such as hydraulic fracturing. While many of the rules promulgated pursuant to the Clean Air Act are likely here to stay following the election, questions remain regarding other key regulations.

Mercury and Air Toxics Rule

EPA's Mercury and Air Toxics rule ("MATS"), sometimes referred to as the Hazardous Air Pollutants rule or the "Utility MACT" rule, requires coal and oil-fired power plants to meet maximum available control technology ("MACT") standards to reduce air pollution pursuant to §§ 111 and 112 of the Clean Air Act. American Electric Power ("AEP") has called MATS "the rule with the greatest potential impact on [its operations]" because it will require coal-fired generating units to install expensive scrubbers to control toxic air pollution.[1] New and existing power plants will be required to meet the emissions levels achieved by the cleanest similar generating units.

EPA estimates that MATS will affect approximately 1,400 coal and oil-fired electric generation units, resulting in a 90% reduction of airborne mercury pollution from coal-fueled plants and an 88% reduction of acid gas emissions from all electric generation units. EPA also estimates that MATS will prevent as many as 11,000 premature deaths each year.[2] However, AEP and other utilities have argued that the MATS rule requires power plant operators to do too much too soon. They note that EPA's compliance deadline of 2015 is unrealistic because it can take four or more years to install scrubbers on each affected unit.[3]

MATS became effective on April 16, 2012, and compliance efforts are underway by affected utilities despite a pending challenge filed by the U.S. Chamber of Commerce and several states and energy companies.[4] The D.C. Circuit Court of Appeals granted EPA's request to defer the appeal while the agency reconsiders certain aspects of the rule, including the calculation of emissions limits for new coal-fired power plants.

Cross State Rule

EPA's Cross-State Air Pollution Rule ("CSAPR"), issued pursuant to the Clean Air Act, would require states to reduce the net emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_X") from fossil fuel power plants within their borders. CSAPR, sometimes called the "Good Neighbor" rule, is designed to ensure that power plants in upwind states do not unreasonably pollute the air in adjacent or downwind states. CSAPR would require 28 states in the East, South and Midwest reduce annual SO_2 and NO_X emissions.

However, on August 21, 2012, following a legal challenge, the D.C. Circuit Court of Appeals vacated and remanded CSAPR.[5] According to the court, EPA *does* have the authority under the Clean Air Act to require upwind states "to bear responsibility for their fair share of the mess in downwind states." But the court found that EPA *does not* have the authority to require some states to bear more than their "fair share" of the responsibility for pollution in neighboring states. The court's primary holding was that EPA exceeded its authority due to the way the agency allocated the responsibility for emissions reductions among the various states. The court found that EPA's approach was impermissible because EPA did not allocate cleanup responsibility based solely on where the pollution was generated. According to the court, "the statute requires every upwind State to clean up at most *its own* share of the air pollution in a downwind State – not other States' shares."[6]

EPA has filed a request for an en banc hearing with the D.C. Circuit, which is currently pending. In the meantime, the court directed EPA to continue enforcing the 2005 Clean Air Interstate Rule, a predecessor to CSAPR that also utilizes a cap and trade system to reduce SO_2 and NO_X emissions.

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FERC Sharpens the Slope for Transmission Developers Seeking Section 219 Rate Incentives

By Kenneth A. Barry

Among the various Federal Power Act (FPA) reforms springing from EPAct 2005[1] was a new authority bestowed on the Federal Energy Regulatory Commission ("FERC" or the "Commission") to award transmission construction rate incentives. The statutory provision -- Section 219 -- created an opportunity and a challenge. The opportunity was obvious: to further FERC's decade-long dream of catalyzing a new era of transmission infrastructure growth on a national scale.[2] The challenge was to frame a coherent and consistent policy for choosing *which* projects to incentivize, and by how much.[3]

In Order No. 679[4] implementing its new incentives authority, FERC rolled out a comprehensive set of concepts and tools to guide the process, along with a menu of incentives it foresaw granting in individual filings. However, *applying* these has entailed a degree of subjectivity and erraticness that has disturbed not only intervenors questioning the rationale of the policy but also some Commissioners (evidenced by the not infrequent dissents).

In a November 15 *Policy Statement*, after sifting through some 1500 pages of industry feedback following a May 19, 2011 Notice of Inquiry (NOI), FERC has enunciated several shifts in implementation policy. This article highlights the pivotal features.

1. *Applying the "nexus" test.*

Under the original Order 679 guidance, the crux of any transmission project developer's request for incentives is its demonstration of "nexus." In FERC parlance, *nexus* connotes a sufficient degree of correlation between the rate incentives sought and the nature and challenges of a candidate transmission project. The analysis is two-fold: FERC weighs whether each *individual* incentive displays the requisite degree of nexus, and whether the entire package of incentives is proportionate -- FERC likes to use the term "tailored" -- to the project's overall scale, beneficial effects, and development/financing challenges. In applying these precepts in case orders, FERC devised a rather simplistic litmus test to facilitate its search for "nexus" – namely, *whether the candidate project is non-routine*.[5] In the new *Policy Statement*, FERC declares that it is time to "reframe" the nexus test to focus more acutely on the criteria for incentives outlined in Order 679.[6] It will accordingly abandon "non-routineness" as its "proxy" for adequate nexus. Instead, the Commission will concentrate on the "need for each individual incentive" while continuing to assess whether the "total package" of incentives appears well-tailored to address a project's "risks and challenges."[7]

2. *Prioritizing risk-mitigating incentives over ROE premiums.*

In virtually every incentives case, FERC has granted some form of risk mitigation award. The most common types are (a) 100% recovery of CWIP in ratebase;[8] (b) deferred recovery of "pre-commercial" developmental costs as a "regulatory asset"; and (c) assurance of recovering all prudently incurred "abandonment costs" (where need to abandon is beyond the developer's control). Alongside these "risk mitigators" has been another prized incentive: an "adder" to the project's "base" ROE.[9] In the *Policy Statement*, FERC praises risk-mitigation incentives as improving cashflow and easing financial stress on the developer, as well as reducing "rate shock" to consumers when projects eventually come online. It then posits these types of incentives may account for "all or much" of the investment risk not fully reflected in the "base ROE" – thus making ROE adders superfluous. The conclusion is that applicants must be sure they have availed themselves of all risk-mitigating incentives *before* seeking "an incentive ROE based on the risks and challenges of a project."

3. *Guidance for applications seeking ROE incentive adders.*

The clear implication is that the FERC intends to be stingier going forward in awarding ROE adders on top of risk mitigators, reserving them for the most visionary projects.[10] Although some commenters responding to the NOI requested FERC to identify specific project characteristics and risks that will merit ROE adders, the Commission declined to be that definitive in the context of a policy statement. However, it did outline four "showings" it expects applicants for ROE adders to make:

- *Unaccounted for risks and challenges.* To earn an ROE adder, an applicant will have to persuade FERC that the project in question has risks and challenges that neither the base ROE nor risk-mitigating incentives can fully reflect or address. As examples of what may get over the bar,[11] FERC singles out projects that may: (a) relieve chronic or severe congestion that is costly to consumers; (b) unlock location-constrained generation with limited or no access to wholesale markets; or (c) apply "new technologies" to facilitate

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Commission Grants "Blanket" Certificate for Solar Distributed Generation

By Ashley B. Macko

On November 28, 2012, the State Corporation Commission ("Commission") issued an Order granting approval and a "blanket" certificate of public convenience and necessity ("CPCN") to Dominion Virginia Power to build, own and operate solar distributed generation throughout the Commonwealth, subject to a cost cap of $80 million, including capital, financing and operations and maintenance costs.[1] The Company had requested approval to build 30 megawatts of Company-owned solar distribution generation at a cost of $111 million, excluding financing costs, to be constructed in two phases.

This proceeding was the first under legislation passed by the 2011 General Assembly, Chapter 771 of the 2011 Acts of Assembly ("Chapter 771"), that was aimed at "promot[ing] solar energy through distributed generation" and directed the Commission to "exercise its existing authority to consider for approval . . . petitions filed by a utility to construct and operate distributed solar generation facilities and offer special tariffs to facilitate customer-owned distributed solar generation as alternatives to net energy metering, with an aggregate amount of rate generating capacity of up to 0.20 percent of each electric utility's adjusted Virginia peak load for calendar year 2010." The Commission noted at the outset that "[t]his is not a typical CPCN proceeding. Chapter 771 creates new standards and policies applicable to specific solar generation that we must implement herein." (Order, p. 5) In addition, the Commission found that Chapter 771, as opposed to requiring a utility to establish the benefits of proposed solar generation facilities up front, allowed the utility to create a demonstration program to assess the benefits thereof. (*Id.*)

In establishing the $80 million cost cap, the Commission concluded that the Company "can gain reasonable experience and data based on the implementation of the program at the cost level approved herein, after which Dominion can file an application under Chapter 771 seeking to raise the cost cap if it believe the results at that point warrant such action." (Order, at 6) With respect to the relative allocation of the overall size of the Program between customer-owned and Company-owned solar, the Commission stated "based on the actual results obtained, Dominion and other participants can evaluate whether any additional [megawatts] available under Chapter 771 should be allocated to Customer-owned, as opposed to Company-owned, facilities." (*Id.*)

With respect to the "blanket" CPCN, the Commission granted the certificate based on the specific circumstances of this case, "which include the practical realities of selecting multiple locations to install these small, dispersed facilities in accordance with the unique provisions embodied by Chapter 771." (Order at 7). The Commission also found its approval was for a voluntary program, meaning that, as previously agreed, the Company would not exercise any eminent domain authority to implement the Program. (*Id.*) The Commission also found that, as proposed by the Company, the Company would comply with all other applicable state and local laws, including the Department of Environmental Quality's recently-promulgated solar permit by rule and file annual reports with the Commission. (*Id.*)

The Commission also addressed the interaction between approved solar distributed generation and the Company's approved renewable portfolio standard program, concluding that the incremental cost allocation requirements of Va. Code § 56-585.2 of the RPS statute are not applicable to the solar distributed generation. (Order, at 8). ❇

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(Endnotes)

1. *Application of Virginia Electric and Power Company for approval of a Community Solar Power Program and for certification of proposed distributed solar generation facilities pursuant to Chapter 771 of the 2011 Virginia Acts of Assembly and §§ 56-46.1 and 56-580 D of the Code of Virginia,* Case No. PUE-2011-00117, Order (Nov. 28, 2012).

Controversial 30-year Moratorium on Uranium Mining Subject to Continued Scrutiny and Likely Legislation

By Ashley B. Macko

On November 30, 2012, the Uranium Working Group issued a report to the state's Coal and Energy Commission providing guidance on a regulatory framework to safely permit uranium mining and milling in Virginia, the home of one of the largest untapped uranium deposits in the United States which is located in Pittsylvania County. The 125-page report was the collaborative effort of the Virginia Department of Health, the Department of Environmental Quality and the Department of Mines, Minerals and Energy, the agencies likely to be involved in the regulation of uranium mining in Virginia if the moratorium is lifted.

The report was prepared at the request of the Governor and specifically requested that the report not take a position on whether to lift the ban. Shortly after the report was released, a state senator from the Richmond area announced he would introduce legislation in 2013 to lift the ban. Proponents of keeping the ban have already been reported in the news as opposing legislation to lift the ban. Stay tuned.

For the Governor's press release and a link to the entire report, go to http://www.governor.virginia.gov/news/viewRelease.cfm?id=1528. ❇

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The "Prima Facie Case" *(continued)*

phenomenon may have occurred over many years with the term "*prima facie*," at least as it is employed in the context of administrative hearings and appeals.

An analysis of the Code of Virginia reveals that the term "*prima facie* case" or "*prima facie* evidence" is used explicitly in no fewer than 180 statutes. Additionally, even where the term is not expressly included in a governing statute, the term has been employed in a number of administrative proceedings over many decades such that a body of case law has been developed which further complicates what it means for a litigant to have established a "*prima facie* case" in any specific context. The term is an ancient one (aren't all such Latin phrases?), and many practitioners may believe they have understood its meaning since their early days in law school. However, it is plain that, as applied by Virginia judges, the term "*prima facie*" has two distinct meanings: "[*prima facie*] may mean simply that the evidence is sufficient to get to the jury, or it may mean [that the evidence] is sufficient to shift the burden of producing evidence." *White v. Commonwealth*, 46 Va. App. 123, 133 (2005). The difference between these two concepts of the "*prima facie* case" was perhaps most succinctly expressed by a Pennsylvania federal judge, who described the distinction as follows:

> [T]here are two senses in which courts use [the concept of *prima facie*]. The first is in the sense of a plaintiff's producing evidence sufficient to render reasonable a conclusion in favor of the allegation he asserts. In the common instance of this use of the concept, it means plaintiff's evidence is *sufficient to allow his case to go to the jury.*
>
> In the second sense of the concept, however, courts use "prima facie" to mean not only that plaintiff's evidence would reasonably allow the conclusion plaintiff seeks, but also that plaintiff's evidence *compels such a conclusion if the defendant produces no evidence to rebut it.*

Husbands v. Pennsylvania, 395 F. Supp. 1107, 1139 (E.D. Pa. 1975)(emphasis added). Unfortunately, the distinction between these two separate concepts of "*prima facie*" is not frequently acknowledged by Virginia courts, and the rationale for employing one meaning of the term over the other in any given statutory context is likewise seldom expressed.

Some legal commentaries have noted the different

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The "Prima Facie Case" *(continued)*

applications of the term "*prima facie*" in Virginia courts. The leading treatise on the law of evidence in the Commonwealth observes that, in the first sense, "establishing a *prima facie* case" means simply that the plaintiff has successfully discharged its burden of going forward, thus avoiding a peremptory instruction or dismissal of the case. *See,* Charles E. Friend, The Law of Evidence in Virginia, § 5-4 at 310 (7th ed. 2012). In many instances, Virginia courts have applied the term "*prima facie*" in accordance with this first definition. *See e.g., Cent. Va. Obstetrics & Gynecology Assocs., P.C. v. Whitfield*, 42 Va. App. 264, 275 (2004) (noting that a "*prima facie*" showing "as a general rule, does not connote anything more than a mere evidentiary sufficiency"); *White, supra*, 46 Va. App. at 133; *Bright v. Commonwealth*, 4 Va. App. 248, 252 (1987) ("Once the Commonwealth establishes a *prima facie* case, '[i]t is the province of the [fact finder] to determine the inferences to be drawn from [the] evidence.'"); *Cottrell v. Deroyal Indus.*, 2005 Va. App. LEXIS 351, *10-11 (Sept. 13, 2005) (unpublished) ("A *prima facie* case is the threshold level of evidentiary proof sufficient to permit a fact finder to be persuaded of the proposition being asserted. However, nothing in the concept of a *prima facie* case requires the fact finding to be to be actually persuaded. In logical terms, a *prima facie* case sets out a sufficient premise, but not a necessary one - a plausible understanding of the evidence that the fact finder can accept, but not one he must accept."); *see also, Virginia v. Black*, 123 S. Ct. 1536, 1553 (2003) (Scalia concurring in part) ("The established meaning in Virginia, then, of the term '*prima facie* evidence' appears to be perfectly orthodox: It is evidence that suffices, on its own, to establish a particular fact."); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("The phrase '*prima facie* case' not only may denote the establishment of a legally mandatory, rebuttable presumption, *but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. . . .*") (emphasis added).

However, in the majority of reported cases, administrative law judges and Virginia courts have concluded that the legislature's inclusion of the term "*prima facie*" in a statute was intended to have a different effect. Thus, most Virginia courts have held that when a party establishes "*prima facie*" evidence of a fact or condition in accordance with the requirements of a particular statute, the consequence is that the burden of producing contrary evidence shifts to the opposing party, and in effect creates a legal *presumption* in favor of the proponent. In this second application of the term, not only does "*prima facie*" mean that the plaintiff's evidence reasonably allows the conclusion plaintiff seeks, but also that plaintiff's evidence establishes such a conclusion as a matter of law if the defendant produces no evidence to rebut it. *See, e.g., Martin v. Phillips*, 235 Va. 523, 526, 369 S.E.2d 397, 399 (1988) ("A presumption is a rule of law that compels the fact finder to draw a certain conclusion . . . from a given set of facts.") (citing *Simpson v. Simpson*, 162 Va. 621, 641-42, 175 S.E. 320, 329 (1934); *Fairfax County Fire & Rescue Dep't v. Mitchell,* 14 Va. App. 1033, 1035, 421 S.E.2d 668, 670 (1992) ("In the absence of competent evidence to the contrary, the statutory presumption controls, and the claimant prevails."); *Babbitt v. Miller*, 192 Va. 372, 379-80 (1951) ("*Prima facie* evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted. It imports that the evidence produces for the time being a certain result, but that the result may be repelled."); *Commonwealth v. Dalton*, 11 Va. App. 620, 623-624 (1991) ("When the complainant establishes a *prima facie* case, it is entitled to a judgment in its favor unless the defendant comes forward with evidence to refute an element of the complainant's case."); *Whitt v. Ervin B. Davis & Co.*, 20 Va. App. 432, 438-439 (1995) ("Where the party having the burden of proof presents a *prima facie* case, the burden of going forward with the evidence shifts to the opposing party.").

Even the most respected Virginia treatise note the frequent inclusion of the term "*prima facie*" in various Virginia statutes, and concludes that over time the meaning of the term has elided, and now is "usually construed to create a rebuttable presumption which shifts the burden of producing evidence onto the defendant." *See* Friend on Evidence, § 5-4 at 311. Indeed, Virginia courts interpreting the statutory use of "*prima facie* evidence" almost uniformly equate the term with the creation of a rebuttable, burden-shifting presumption, even in the absence of any evidence that the creation of such a presumption was intended by the General Assembly when the law was enacted. Thus, in *SCLC v. Shannon*, 270 Va. 104, 109-110 (2005), the Supreme Court of Virginia concluded that the legislature's inclusion of the term "*prima facie* evidence" in Va. Code § 59.1-92.6 clearly "creates a rebuttable presumption of [gun] ownership based upon registration." Likewise, in *Richardson v. Henry County Dep't of Social Services*, 223 Va. 670, 677 (1982) – a case involving the termination of residual parental rights under Va. Code § 16.1-283 – the court found an implied statutory presumption had been created through the statute's use of the phrase "*prima facie* evidence." The Court concluded that, because the local Department of

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Social Services had shown the parent of minor children had failed to follow through with a plan developed by the DSS to reduce or eliminate the neglect and abuse of her children, a "*prima facie*" case had been established, and therefore the mother was required to come "forward with sufficient evidence to the contrary" in order to rebut the statutory conclusion that the conditions which resulted in the neglect or abuse could be substantially corrected or eliminated so as to allow the child's safe return to her parent.

In some instances, courts have inferred presumptions as to certain conditions which are not even addressed by the statutory language. For example, in *Hop & Wine Bevs. v. Va. Dep't of Alcoholic Bev. Control*, 2012 Va. Cir. LEXIS 75, *16-18 (July 18, 2012), the court concluded that once a plaintiff puts forth "*prima facie* evidence" that a wholesale distribution agreement existed between itself and the brewery pursuant to Va. Code § 4.1-500, then a "presumption of law" also is created as to the <u>sales territory</u> covered by that agreement which also must be applied by the ABC Board, even though the statute in question is silent on this latter point.

In most cases where the court has found that the making of a "*prima facie* case" also creates a legal presumption which compels a particular finding of fact, the court goes on to acknowledge that the presumption which is created is one which may be rebutted by contrary evidence introduced by the opposing party. *See, e.g., Whitt v. Ervin B. Davis & Co.*, 20 Va. App. 432, 438-439 (1995) ("Where the party having the burden of proof presents a *prima facie* case, the burden of going forward with the evidence shifts to the opposing party. While the burden of proof remains unchanged, the party against whom a prima facie case exists can avoid the presumed result only by producing evidence to explain to the satisfaction of the trier of fact why the prima facie evidence is in error or is otherwise not subject to the appropriate standard of law applicable to such facts."). However, a number of Virginia statutes expressly state when a fact established by "*prima facie* evidence" establishes a presumption, and likewise expressly state that said presumption is "rebuttable." *See, e.g.*, Va. Code § 15.2-968.1 ("[*P*]*rima facie* evidence that the vehicle described in the summons issued pursuant to this section was operated in violation of such ordinance, together with proof that the defendant was at the time of such violation the owner, lessee, or renter of the vehicle, <u>shall constitute in evidence a rebuttable presumption</u> that such owner, lessee, or renter of the vehicle was the person who committed the violation."); Va. Code § 46.2-1219.2 ("In the prosecution of an offense established under this section, *prima facie* evidence that the vehicle described in the summons issued pursuant to this section was parked in violation of this section, together with proof that the defendant was at the time of such violation the owner, lessee, or renter of the vehicle, <u>shall constitute in evidence a rebuttable presumption</u> that such owner, lessee, or renter of the vehicle was the person who committed the violation.") (emphasis supplied in each case). Furthermore, some Virginia statutes do not use the phrase "*prima facie* evidence" at all, and instead specifically delineate when a presumption is created – by including the word "presumption" in the statute itself. *See, e.g.*, Va. Code § 18.2-269 ("[T]he amount of alcohol or drugs in the blood of the accused at the time of the offense . . . <u>shall give rise to the following rebuttable presumptions</u> . . . .") (emphasis supplied); Va. Code § 38.2-5008 ("<u>A rebuttable presumption shall arise</u> that the injury alleged is a birth-related neurological injury where it has been demonstrated, <u>to the satisfaction of</u> the Virginia Workers' Compensation Commission, that the infant has sustained a brain or spinal cord injury . . . ."); Va. Code § 65.2-402 ("Respiratory diseases that cause (i) the death of volunteer or salaried firefighters or Department of Emergency Management hazardous materials officers or (ii) any health condition or impairment of such firefighters or Department of Emergency Management hazardous materials officers resulting in total or partial disability <u>shall be presumed to be occupational diseases</u>, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary.") (emphasis supplied in each case). Arguably, these statutes are evidence that the General Assembly knows how to create statutory presumptions when it wants to, and uses very specific language in doing so. They may also suggest that, in the absence of such express language, no presumption is warranted.

How then do counsel or judges reconcile these two distinct applications of the term "*prima facie*" when construing statutes which employ the language? When a statute provides that proof of certain circumstances shall constitute a "*prima facie* case" or "*prima facie* evidence" that a specific condition exists, how do practitioners determine whether or not the establishment of such a *prima facie* case also creates an evidentiary *presumption* that such a condition exists, such that some contrary evidence must be introduced by the opposing side to overcome the presumption? One way may be to simply look, exclusively, at the language of the statute itself. In interpreting Virginia statutes, courts of the Commonwealth must give the statutory language its "plain

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meaning" and must not "add language, [or] ignore language, contained in statutes." *Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38, 46 (2003). "This textualist approach presumes that the legislature 'chose, with care, the specific words of the statute.'" *Cent. Va. Obstetrics & Gynecology Assocs., P.C.,* 42 Va. App. at 276 (quoting *Kane v. Szymczak*, 41 Va. App. 365, 371, (2003)); *see also Cheatham v. Commonwealth,* 215 Va. 286, 289 (1974) (concluding that "if the General Assembly had intended to create prima facie evidence . . . it would have included specific language to accomplish that purpose"). Using this more conservative approach, one may be inclined to conclude that, if the legislature intended for fact finders to put their thumbs on one side of the legal scale to tip the balance in favor of a particular party once evidence of certain facts was introduced – *i.e.*, once a "*prima facie* case" had been established – then the legislature would have expressly stated its intention in the statute, and the assumption of such a legal presumption in the absence of direct statutory guidance may be improper.

In any event, it is clear that "*prima facie*" is a term which has two very distinct meanings, and in the absence of express statutory language, or a developed body of case law interpreting how the term is meant to be interpreted in any particular statute, lawyers remain free to argue either application. As the saying goes, "where you stand on an issue all depends on where you sit."

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Cross-State Air Pollution *(continued)*

Background

The Clean Air Act (the "Act") recognizes that air pollution is not static - pollution from one state has the potential to blow around and adversely affect another state. In an effort to combat this problem, the Act requires that State Implementation Plans ("SIPs") contain provisions prohibiting facilities in one state from "contributing significantly" to nonattainment of ambient air quality standards in another state.[2] This requirement is often known as the "good neighbor" provision. The CSAPR was designed to implement this good neighbor provision in the easternmost half of the U.S. for certain pollutants (NOx and SOx) commonly associated with emissions from power plants.

Both the federal government and state governments are involved in air pollution control in the United States: the federal government sets ambient air quality standards and the states identify measures to attain those standards within state boundaries. Typically, once a federal standard is set, states then include regulatory measures in their SIPs to implement the standards. If a state does not prepare a timely or adequate SIP to address a particular standard, then the burden shifts to the federal government to prepare a Federal Implementation Plan ("FIP") to implement air quality standards within that particular state.

In developing its rule to regulate interstate air transport, EPA determined that the CSAPR would apply to 28 states because air quality modeling showed that emissions of NOx and/or SOx from these states would significantly contribute to nonattainment of one or more standards in other downwind states. Having determined which states had "significant contributions" to downwind nonattainment, EPA was also obligated to identify the extent of the emission reductions that would be required by these states to avoid significant contributions to nonattainment to downwind states. To do this, EPA used a different methodology than when it determined significant contribution. EPA modeled a variety of cost-per-ton levels of pollutant removal and evaluated the downwind result of these removal efforts.[3] EPA then weighed air quality and cost concerns to choose the final cost-per-ton levels of pollutant removal to use for the states. The agency ultimately chose consistent, across-the board cost-per-ton values and developed emissions reduction budgets based on those values. The result of this methodology was that the emissions reduction budgets did not necessary reflect the amount of each state's significant contribution to downwind nonattainment.

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Cross-State Air Pollution *(continued)*

In addition, unlike its usual practice for addressing air quality standards, EPA did not provide the states with an opportunity to prepare SIPs to implement the emission reductions. Instead, EPA promulgated FIPs to implement the emissions reduction requirements for those 28 states, and to develop an interstate trading program to promote cost-effective compliance options.

Various state agencies, local governments, industry groups, and labor organizations petitioned for review of the CSAPR, arguing that EPA has exceeded its statutory authority in the development of the rule. The D.C. Circuit agreed and vacated the CSAPR on August 21, 2012.

The Court's Analysis – What Did EPA Do Wrong?

The D.C. Circuit held that the CSAPR exceeded EPA's authority under the Act for several reasons.

First, the court held that the agency exceeded its statutory authority under the good neighbor provision of the Act. Under the Act, EPA's authority is limited to requiring upwind states to reduce "*amounts* which will . . . contribute significantly to nonattainment" in other states.[4] Since EPA never determined precisely the amount each state's significant downwind contributions, EPA's implementation had the potential to over-control pollution reductions for some states. Because EPA ultimately used region-wide modeling projections to calculate emissions reductions for each state, some states were faced with the possibility of having to reduce emissions more than was strictly necessary to eliminate their "significant" contribution to downwind state nonattainment.

EPA's second error was that it did not consider proportionality in establishing its emission reduction requirements for the upwind states. In a previous "good neighbor" provision case, the court had held that EPA could not force an upwind state to take on the burden of reducing other upwind states' emissions.[5] EPA's methodology under the CSAPR did not take into account other upwind state contributions to nonattainment, and similarly, it did not take into account a state's own contribution to its nonattainment.

Third, the court found EPA was obligated to ensure that the combined reductions of all upwind states did not go beyond that amount necessary for downwind states to meet attainment. This is another example of potential over-control to which the court objected.

The fourth and final problem identified by the court was the fact that EPA did not first permit states to develop SIPs to implement the new requirements, but instead, prepared its own FIPs to implement the emission reductions in the states. The good neighbor provision specifically provides that states will develop SIPs to address the intrastate transport of the pollutants. By preemptively issuing FIPs, EPA denied the states the right to implement emission reductions in accordance with the Act and in ways that made sense for the localities.

Conclusion

The Clean Air Act and its implementing regulations require a complex system of federal and state government interactions. This system was set up to ensure that standards are established on a nationwide basis, but implementation is done at the state level. EPA ignored this structure when it developed the CSAPR and its FIP. In vacating CSAPR, the D.C. Circuit left the existing Clean Air Interstate Rule in place and sent EPA back to the drawing board. Note that the court did not address EPA's trading program or its allowance allocation methodology, so those issues will likely be reviewed when the next version of a transport rule is challenged.

In October, EPA, supported by others, filed a petition for en banc review of the CSAPR decision before the full D.C. Circuit. Whether the court will rehear the case is still up in the air (pun intended!). In the meantime, EPA is grappling with what to do about state SIPs that rely on CSAPR reductions to meet a variety of Clean Air Act obligations.

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Cross-State Air Pollution *(continued)*

(Endnotes)

1. *EME Homer City Generation v. Environmental Protection Agency,* 696 F.3d 7, 89 (D.C. Ct. App. 2012). Note that the decision in this case includes a 44-page dissent in which Judge Rogers takes the majority to task for disregard of precedent and a redesign of Congress' intended working relationship between the federal government and the states with respect to air quality standard implementation. *Id.* at 156-58.

2. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2012).

3. The process for calculating the cost-per-ton of pollutant removal requirements based on upwind contributions to downwind states was complex and beyond the scope in this article. *See EME*, 696 F.3d 7, 24 (D.C. Ct. App. 2012) (describing this process in some detail).

4. 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added).

5. *North Carolina v. Environmental Protection Agency*, 531 F.3d 896, 921 (D.C. Cir. 2008).

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."

Electric Utility Regulation Act *(continued)*

Reversing the Commission's decision on this issue, the Court emphasized the language in Subsection A 5 e providing for rate adjustment clause recovery of "actual" costs.[9] According to the Court, this "plain language" limits the Commission's traditional ratemaking authority under Chapter 10, so that a utility must be allowed to recover actual environmental compliance costs through a rate adjustment clause even if the utility had a prior opportunity to collect them in base rates. There was no dispute that the costs at issue were incurred to pay for qualifying environmental projects or that they had never been recovered.

In explaining its ruling, the Court clarified the standard of review applicable to questions of law involving Commission interpretations of statutory text. The Commission and other appellees asserted that the Court had limited *de novo* review of the Commission's interpretation of Subsection A 5 e and the other relevant provisions of the Act, based on the Court's statement in a 2009 opinion that "the practical construction given by the Commission to a statute it is charged with enforcing is entitled to great weight by the courts and in doubtful cases will be regarded as decisive."[10] Based on the circumstances of this case, however, the Court disagreed that the Commission's interpretation must be deemed "decisive." According to the Court, this level of deference is appropriate only when the Commission's interpretation is "long continued," without any intervening legislation demonstrating that the General Assembly disagrees with that interpretation. Because the Commission's construction of Subsection A 5 e was "not a long-standing one" that the General Assembly had a prior opportunity to consider, "the presumption of legislative acquiescence" did not apply.

With respect to the second category of costs, the environmental component of the capacity equalization charges paid by Appalachian to its affiliates, the Court affirmed the Commission's ruling. During the proceedings below, the Commission explained that the capacity equalization charges do not specifically identify the portion that is attributable to environmental compliance costs. As a result, the record contained "wide-ranging" estimates of the amount of those costs. The Court held that the Commission's decision that these estimates "did not sufficiently demonstrate" that Appalachian incurred "actual" costs was not contrary to the evidence or lacking in evidentiary support.

Dominion Appeal

Dominion's appeal was based upon one aspect of the Commission's decision in its 2011 biennial rate review, also a first-of-its-kind proceeding under the 2007 Act.[11] There, the Commission held that in the next biennial review in 2013, Dominion's earnings for 2011 and 2012 will be measured

Electric Utility Regulation Act *(continued)*

against a single fair rate of return on common equity ("ROE") of 10.9%.

In a biennial review proceeding, a utility's ROE is compared to its historic earnings collected during the two-year period in question.[12] If earnings are below the ROE by more than fifty basis points, the Commission must order an increase in rates.[13] If earnings exceed the ROE by the same amount, the Commission must direct the utility to issue customer credits, and in certain circumstances rate reductions may also be required.[14] Section 56-585.1 A 2 requires the Commission to determine a utility's ROE "during each such biennial review."[15]

On appeal, Dominion took the position that the ROE determined by the Commission may apply prospectively only. It relied in part on § 56-585.1 A, which provides that in a utility's "going-in" review,[16] the Commission "shall determine the rates that the utility may charge until such rates are adjusted," as well as § 56-585.1 A 8, which provides that "any revisions in rates . . . shall take effect not more than 60 days after the date of the [Commission's] order" in a biennial review case.[17] Because a utility's ROE is a component of its rates, Dominion argued, these provisions require any changes to the ROE to be applied prospectively. Based on that interpretation of the statute, the Commission would be required to use two ROEs when it performs the earnings test in the 2013 biennial review. Specifically, earnings collected during the first eleven months of 2011 would be compared against the 11.9% ROE that was previously established in the 2009 going-in review, with earnings for the remaining thirteen months of the 2013 biennium measured against the 10.9% ROE determined in the 2011 biennial review.

The Court, however, accepted the Commission's interpretation of the 2007 Act. It first concluded that the provisions relied upon by Dominion apply to the rates that a utility charges for electric service, and not to rates of return, "which under the statute are distinct, separate concepts." In addition, the Court agreed that the Commission has discretion under the Act to determine how a utility's ROE will be applied during a biennial review. The Act does not contain clear language that either authorizes or prohibits the Commission from applying one ROE to the full two-year period when it conducts a utility's earnings review. Given the statute's silence on this issue, the Court explained that when the General Assembly "has not placed an express limitation in a statutory grant of authority," it will presume that the General Assembly "intended for the Commission, as an expert body, to exercise its sound discretion." The Court also noted that certain provisions in the Act that were not directly relevant to the case explicitly limit the Commission's discretion in determining a utility's ROE.

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(Endnotes)

1. The appeals were docketed as Record No. 120394 (Appalachian) and Record Nos. 120519 and 120520 (Dominion).
2. Va. Code § 56-576 *et seq.*
3. *Petition of Appalachian Power Company, For approval of a rate adjustment clause, E-RAC, to recover costs incurred in complying with state and federal environmental laws and regulations, pursuant to Va. Code § 56-585.1 A 5 e*, Case No. PUE-2011-00035, Order Approving Rate Adjustment Clause (Nov. 30, 2011).
4. Va. Code § 56-585.1 A 5 e.
5. *Id.* § 56-585.1 A 3.
6. For over six decades, Appalachian and other subsidiaries of American Electric Power Company, Inc. have operated as a tight power pool governed by an Interconnection Agreement approved by the Federal Energy Regulatory Commission. Pursuant to that agreement, Appalachian is required to pay its affiliates for generating capacity that it needs to meet its native load obligations. The payments are commonly referred to as "capacity equalization charges."
7. Section 56-585.1 C provides that "[e]xcept as otherwise provided in this section, the Commission shall exercise authority over the rates, terms, and conditions of investor-owned incumbent electric utilities for the provision of generation, transmission, and distribution services to retail customers in the Commonwealth pursuant to the provisions of Chapter 10 [of Title 56 of the Code]." Va. Code § 56-585.1 C.
8. *Id.* § 56-585.1 A 7.
9. Although Subsection A 5 e authorizes rate adjustment clause recovery of both actual and projected costs of environmental compliance projects, Appalachian sought to recover actual costs only.
10. *Piedmont Envtl. Council v. Virginia Elec. & Power Co.*, 278 Va. 553, 563, 684 S.E.2d 805, 810 (2008).
11. *Application of Virginia Electric and Power Company, For a 2011 biennial review of the rates, terms, and conditions for the provision of generation, distribution, and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2011-00027, Final Order (Nov. 30, 2011).
12. Va. Code § 56-585.1 A 8.
13. *Id.* § 56-585.1 A 8 i.
14. *Id.* § 56-585.1 A 8 ii, iii.
15. *Id.* § 56-585.1 A 2.
16. The going-in review was the first case in which Dominion's historic earnings were compared against an ROE under the 2007 Act. As required by the statute, Dominion and Appalachian each filed their going-in review applications in 2009. The cases were decided in 2010. *See Application of Virginia Electric and Power Company, For a 2009 statutory review of rates, terms, and conditions for the provision of generation, distribution, and transmission services pursuant to§ 56-585.1 A of the Code of Virginia*, Case No. PUE-2009-00019, Order Approving Stipulation and Addendum (Mar. 11, 2010); *Application of Appalachian Power Company, For a statutory review of the rates, terms, and conditions for the provision of generation, distribution, and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2009-00030, Final Order (July 15, 2010).
17. Va. Code § 56-585.1 A, A 8.

EPA Rules Appear Secure *(continued)*

Carbon Regulation and Pricing

Perhaps the most controversial rule issued by EPA in the last four years is the New Source Performance Standard ("NSPS") rule for GHG emissions. The NSPS rule sets limits for CO_2 emissions from new coal-fired power plants. New generating units may not exceed an emissions rate of 1,000 pounds of CO_2 per megawatt-hour ("MWh").[7] This threshold would allow the construction of new combined cycle gas facilities, which emit roughly 800 pounds of CO_2 per MWh. But the rule effectively precludes the construction of any new coal facilities without carbon capture capabilities. EPA has said that it may also regulate existing facilities pursuant to the NSPS program, but has not announced when those rules might be promulgated.

The NSPS rules represent the first direct CO_2 emissions limits for power plants. EPA's "Tailoring Rule," issued in 2010, requires that new and modified generating plants must utilize the "best available control technology" for controlling CO_2 emissions prior to receiving construction or operating permits. However, unlike the NSPS rules, the Tailoring Rule did not establish a numeric emissions limit for generating units.

Further, some believe that the administration will pursue additional CO_2 controls through a federal carbon policy. In 2009, the House of Representatives passed the American Clean Energy and Security Act, which contained a federal renewable portfolio standard and a cap and trade program. The bill failed to pass the Senate, and there is no indication that the current Congress intends to revisit a cap and trade bill.[8] However, there has been some speculation that the administration could pursue a carbon tax as a means to cut the federal budget deficit.[9]

Potential Fracking Regulations

Finally, EPA may propose hydrologic fracturing regulations, which would affect the supply and price of natural gas. Hydrologic fracturing, or "fracking," is an extraction technique that allows natural gas producers to reach gas stored in previously inaccessible shale formations. The technology uses high-pressure water along with various chemicals in order to fracture seams in deep rock formations, allowing for the enhanced recovery of natural gas.

While several states regulate fracking because of potential groundwater contamination – and some, including New York, are considering banning the practice altogether – the federal EPA has not yet promulgated rules restricting the underground injection of fracking fluids. In April 2012, EPA issued rules to mitigate air pollution resulting from gas drilling. The air rules require developers to capture the gas that is emitted as new wells are tapped, as opposed to burning off or "flaring" the released gases. However, some environmental organizations have urged the agency to use its authority under the federal Safe Drinking Water Act ("SDWA") to prevent groundwater contamination from fracking. Congress has directed EPA to study of the impacts of hydrologic fracturing on ground water supplies. EPA's report, due in 2014, could lay the foundation for additional fracking regulations under the SDWA.

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(Endnotes)

1. American Electric Power, Mercury and Air Toxics Standards, available at http://www.aepsustainability.com/ourissues/envperformance/MercuryToxicStandards.aspx.

2. U.S. EPA, "Mercury and Air Toxics Standards – Cleaner Power Plants," U.S. EPA Air and Radiation Division, Apr. 10, 2012, available at http://epa.gov/airquality/powerplanttoxics/powerplants.html.

3. *See supra* n.1.

4. *White Stallion Energy Center v. EPA*, No. 12-1272 (D.C. Circuit).

5. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 15 (D.C. Cir. 2012).

6. *Id.* (emphasis original).

7. U.S. EPA, "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units," U.S. EPA Air and Radiation Division, March 27, 2012, available at http://epa.gov/carbonpollutionstandard/pdfs/20120327proposal.pdf.

8. H.R. 2454, 111th Cong. (2009).

9. *See* "Global warming talk heats up as carbon tax revisited," USA Today, available at http://www.usatoday.com/story/weather/2012/11/14/global-warming-climate-change-carbon-tax/1704787/.

FERC Sharpens the Slope *(continued)*

more efficient, reliable usage of existing facilities. But as to the latter factor – new technologies – FERC admits to causing confusion in the past by considering "advanced technology" showings *either* as part of the general nexus analysis *or* as a discrete "technology adder" to the base ROE. In the future, says FERC, use of advanced technologies will be given weight in the nexus analysis, but will not form the basis for a discrete "technology adder."

- Attentiveness to risk minimization. Applicants will be encouraged to explain how they will manage project risk in ways other than by proposing risk mitigation incentives. As an example, the *Policy Statement* cites pursuing "joint ownership arrangements" to attenuate risk in siting and environmental permitting.[12]
- Assessment of alternatives. In the past, intervenor arguments that a project proposed for transmission incentives is not the most "cost-effective" approach have met with a chilly reception at FERC, which defers to regional planning and state siting processes for that sort of analysis. Here, however, FERC appears to shift ground somewhat, stating an applicant seeking an ROE adder *should* discuss its project's merits vis-à-vis alternatives, thus providing a showing of "demonstrable consumer benefits."[13]
- Capping costs for incentive purposes. In another sharp break with precedent, FERC states that it "expects" applicants for ROE incentive adders to *commit* to capping the application of the incentive at the estimated cost of its project.[14] The *Policy Statement* acknowledges that providing a definitive cost estimate is difficult when a project applies for incentives (often early in its gestation process); it therefore suggests, as an option, that the *last* cost estimate relied upon in the transmission planning process adopting it could serve as the relevant figure.[15]

The new incentives *Policy Statement* points to a more exacting – and incrementally less generous – approach to applying Section 219 as an impetus for transmission expansion. Bonus ROEs would seem, henceforth, to be more the exception than the norm. But even with elimination of the notoriously amorphous "non-routineness" test, an irreducible amount of subjectivity and quasi-legislative judgment remains in the hands of the sitting Commissioners exercising the authority to make transmission construction a more lucrative, or at least less risky, proposition.

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(Endnotes)

1. The full title is "Energy Policy Act of 2005." New FPA Section 219, the focus of this article, appeared as §1241 of EPAct 2005.

2. The massive Midwest and Northeast blackout in August 2003 and the ensuing Final Report of the U.S.-Canada Power System Outage Task Force in April 2004 increased national consciousness of prioritizing grid reinvestment and upgrading reliability practices. Before that, FERC's seminal Order Nos. 888 and 2000 fostering regional wholesale capacity and energy trading markets depended on an increasingly robust, long-distance transmission network. More recently, the Federal and state-level promotion of renewable resources, especially wind and solar power, has, as recognized in FERC Order Nos. 890 and 1000, accelerated the need for substantial expansion, modernization, and inter-utility coordination of the grid.

3. Adding to the uneasy balance between "normal" and incentivized rates was that the latter must still meet the "just and reasonable" and "not unduly discriminatory or preferential" criteria of FPA §§205 and 206.

4. *Promoting Transmission Investment Through Pricing Reform*, 71 FR 43294 (July 31, 2006), FERC Stats. & Regs. ¶31,222; *order on reh'g*, Order No. 679-A, 72 FR 1152 (Jan. 10, 2007), FERC Stats. & Regs. ¶31,236.

5. The Commission traces the origins of this test to *Baltimore Gas & Elec.*, 120 FERC ¶61,084 (2007).

6. The statute itself identifies the goals of "ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." It also instructs FERC to promote capital investment in transmission infrastructure and award ROEs that attract new investment..

7. Previously, FERC has not been receptive to intervenor claims that a particular incentive is *unneeded*. It has retorted that Congress charged it with a duty to incentivize transmission projects as a clear public good, and it would undermine that goal to screen each incentive request under a need or "but for" analysis. However, since the *Policy Statement* suggests that the process should be more attuned to the "need" for rate incentives, intervenors may now have more scope to contend that a project's viability is not dependent on granting an incentive. How far FERC's new emphasis on "need" will be taken remains to be seen.

8. FERC's historic norm is to grant 50% of CWIP in ratebase.

9. The "base ROE" is that which would normally be granted applying FERC's standard analytical tools.

10. Notably, in recent cases, FERC has already shown a tendency to scale back on ROE adders.

11. FERC notes that this list is not meant to be "exhaustive."

12. The implication is that politics do matter in seeking permits, and bringing on partners with local clout may help.
13. Acknowledging a "timing challenge" in making such a showing, FERC promises to be "flexible" in terms of accomplishing it -- allowing (for example) an applicant to reference regional planning forums compliant with other FERC orders, or the actions of a local regulatory body, to support a claim of superiority to other alternatives.
14. In past cases, FERC has consistently rejected intervenor arguments that an ROE adder, if granted, should not apply to any overruns beyond the estimated cost of the project.
15. FERC commends for applicant consideration a specific capping and cost-sharing approach advocated by the Southwest Power Pool Regional State Committee.

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