

Administrative Law News

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The Section's latest Brown Bag lunch is held on April 11, 2003.

Editor's Note: *The articles in this edition of the Administrative Law News show a general trend: the increasing prominence of the Virginia State Corporation Commission in matters affecting regulated industries, thanks to recent developments at the General Assembly, the FCC, and the Virginia Supreme Court. Just as the SCC achieves greater prominence, it is implementing significant enhancements to public access of SCC documents. All these developments highlight the importance of the Administrative Law Section's long-standing partnership with the SCC and the College of William & Mary in presenting the annual spring rite known as the National Regulatory Conference, where we expect lively debate on the challenges currently facing regulated industries.*

A Lively NRC Program in Williamsburg

by the Hon. Alexander F. Skirpan, Jr.

2003 has continued to be a year of turmoil for regulated industries, and the 21st National Regulatory Conference addresses this issue head on by taking a close look at the impact of financial markets on these industries.

Based on my participation on the NRC Program Committee, this topic has already generated a great deal of interest, and I expect some lively debates among panel members over the course of two days. Susan Abbott, whose experience includes managing The Power Group of Moody's Investors Services, will set the tone for the conference during her Keynote Address.

JoAnne Nolte heads up the panel that examines The Impact of Rating Agencies on Utility Stock Prices and Economic Viability, and she's lined up a Public Utilities Commissioner from

North Carolina, the CFO of Dominion, and a research analyst from Davenport & Company to tackle this thorny issue. Joseph Stanko will moderate a discussion on Restructuring, Competition, and Long Range Planning in the Energy Industry featuring representatives from an investment banker, major players in the electric and gas industries, and counsel to the congressional committee shaping the next major federal energy regulation. Eric Page's panel addresses the Triennial Review, which attempts to balance the interests of incumbent telephone companies and competitive telephone companies. Susan Kelly's panel delves into Wall Street's impact on regional transmission entities, which are meant to play a vital role in developing competitive electricity markets. And last

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Alex Skirpan serves as Chair of the Administrative Law Section Board of Governors. He is a Hearing Examiner for the Virginia State Corporation Commission and is Chair of the Virginia Association of Administrative Law Judges and Hearing Officers.

Surf, Sand and CLEs

Paige Holloway and JoAnne Nolte are organizing this year's CLE panel for the VSB's annual meeting. As always, the panel will provide a great opportunity to get involved in bar activities, meet your colleagues, and earn CLE credits while enjoying the gentle breezes of Virginia Beach in June.

The program is "Administrative Law Practicum: Nuts and Bolts of Appearing Before an ALJ" and will be held on Friday, June 20th from 2 to 4 p.m. This year's program builds on last year's collaboration with the Environmental Law Section and provides practice tips for administrative proceedings. The details are still being worked out, but so far the first panel will feature two representatives of the Health Enforcement Directors: Allen L. Knapp from the Health Department's Office of Environmental Health Services and

Robert A.K. Payne from the Health Department's Office of Drinking Water. Senior Assistant Attorney General C. Meade Browder, Jr. will round out this panel.

The second panel will feature two participants in a merchant power plant siting case at the State Corporation Commission, John M. Holloway, III and Michael D. Thomas, Hearing Examiner.

Both panels will offer valuable insights for practitioners who regularly appear before ALJs and for practitioners who don't appear regularly and need some basic guidance.

Registration materials for the VSB annual meeting will be mailed in April and will also be available on the VSB website, www.vsb.org. ■

NAVIGATING THE SEVEN "C"s

A PRACTITIONER'S VIEW OF WHAT AN ALJ/HO SHOULD DO

by James Patrick Guy, II

Editor's Note: At the February 24, 2003, meeting of the Virginia Association of Administrative Law Judges and Hearing Officers, three Section members addressed the association on the topic of advice from administrative practitioners to hearing officers and ALJ's. The speakers were Page Holloway of McCandlish Holton, Martha (Marty) Parrish of the Office of the Attorney General of Virginia, and the Section's Immediate Past Chair, Jim Guy of LeClair Ryan. Mr. Guy had conducted an informal survey of administrative lawyers, and presented a summary of his findings. That summary is reprinted here.

1. Clarity. Make sure everyone understands what is going to happen. Pretrial conferences & orders are great where possible. If there is a staff lawyer, he or she can do a lot of this, but you should be sure

Jim Guy heads the Administrative Law and Government Relations Team at the Richmond, Virginia based law firm, LeClair Ryan. His practice encompasses a wide array of services to energy and telecommunications industry participants. He is Immediate Past Chair of the Administrative Law Section of the Virginia State Bar and chaired the 19th National Regulatory Conference in Portsmouth, Virginia. Jim was an Echols Scholar at the University of Virginia, where he took his undergraduate and law degrees. Jim speaks pretty good French with a slight Belgian accent and, instead of golf, plays Irish-American pub music with the Richmond band, Uisce Beatha.

it gets done. At a minimum, start your hearing or docket with a recitation of why everyone is there and what is going to happen. Administrative lawyers seldom have the luxury of doing only one thing all the time, so even the frequent practitioners benefit from signposting and clarity. More important, the occasional practitioner and the client/parties can do a better job presenting and concentrating on the substantive issues if uncertainty about the process is minimized. Little stuff, too: when are your breaks? Lunch, anyone?

Practice tip: Share the game plan.

Practitioner's example: Because the routine is often different from a courtroom/courthouse, it is always helpful if the ALJ speaks to any particular customs that the ALJ follows. For example, I worked on a matter where the ALJ wanted a written summary of proposed testimony before the witness was presented; in another matter, the ALJ wanted a proffer of the testimony and to really start with any cross-examination the other side had. In addition, it is always helpful to know if there are any time limitations or constraints that the ALJ is under before the hearing commences. I haven't had any bad experiences, just frustrating ones where no one explained the unwritten "rules" of conduct that the hearing examiner routinely used.

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SCC Introduces "Case Docket Search"

New SCC website feature active March 31
by Kenneth J. Schrad

The State Corporation Commission (SCC) begins its second century of service to the Commonwealth by taking advantage of 21st Century technology to enhance public participation in SCC cases. The SCC believes the public interest is best served by making it as easy as possible for Virginians to gain access to public information filed in SCC cases.

Most public documents filed in SCC cases are now available for viewing and printing via the SCC website through its "Case Docket Search" portal. The new website feature allows Internet users the ability to:

- check daily filings made in the SCC's Document Control Center
- check daily for new cases established by Commission order
- see the complete "Calendar of SCC Cases"
- search all case profiles since 1980
- search all documents since April 9, 2002

The SCC was created in 1902, opening its doors on March 2, 1903. Now, 100 years later, SCC Chairman Hullahen Williams Moore says, "Internet technology allows us to open a new door to the Commission that should make it easier than ever for the regulated industry and the public to stay informed of SCC matters."

Each year, the SCC establishes approximately 1,200 cases, conducts nearly 150 hearings, and receives more than 8,000 documents in those cases. The SCC has been posting Commission orders and SCC hearing examiner reports to the website since 1996. But, these have been limited to selected cases of general public interest.

A new case management computer system installed at the SCC in April 2002 converts all documents filed in an SCC case to an electronic file. It is a special web version of that case management system that is being opened to the public via the SCC website.

Ken Schrad is the Director of Information Services for the Virginia State Corporation Commission. The Division of Information Resources is the liaison office between the Commission and the General Assembly, Congress, other governmental agencies, and community and industry groups. The division coordinates public information activities of the SCC, handles inquiries from the news media and the general public, issues SCC news releases and serves as the SCC's official spokesman. Ken has been with the SCC since 1986 and has served as director of the division since 1990. A former news reporter in Nebraska and a journalism graduate from the University of Nebraska, he is personally committed to "ease of access" to public records.

How fast?

Documents filed in the SCC's Document Control Center will not appear immediately on "Case Docket Search." The process of imaging documents for public view can take 24-48 hours depending on the volume of filings on a given day. Often, the SCC issues news releases on high profile cases. In those cases, the news release will include a link to the relevant document. All documents on the web are "unofficial" versions and provided only for public convenience. "Official Copies" of documents can always be obtained from the Clerk's Office of the SCC.

Some Restrictions

While the goal of the SCC is to make the majority of the documents in any case available via "Case Docket Search," certain documents will not be available. The most obvious is any document deemed confidential. When a confidential document is submitted in an SCC case, a redacted public version is usually available. Large exhibits such as maps, charts, and diagrams also will be unavailable. These documents, of course, will continue to be maintained by the Document Control Center in the Clerk's Office of the SCC. Transcripts of SCC hearings are also not available in "Case Docket Search." Transcripts are the property of Associated Reporters, Ltd., a private firm which serves as the official court reporters for the Commission.

In the interest of individual privacy protection, the SCC will not make comments submitted by the general public available via "Case Docket Search." Often times, these letters contain the personal addresses and home telephone numbers of private individuals who are not formal parties to the case. They simply wish to personally comment on an issue in an SCC case.

Public Comment via SCC web site

The general public is invited to submit such comments using the SCC website. This new feature makes it easy for anyone with web access to complete a case specific comment form: <http://www.state.va.us/scc/caseinfo/notice.htm>.

Please don't confuse this new feature for the general public to file public comments with any special directive to allow "electronic filing" of matters by formal parties if such a mechanism has already been authorized by an SCC order or hearing examiner ruling in a particular case. It is simply another way (the convenience of the Internet) for the public to submit comments if, and only if, the SCC

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Will the SCC Suitout for Telecom Battles?

by Robert M. Gillespie

Recent developments at the state and federal level empower the Virginia State Corporation Commission ("SCC") to take a greater role in shaping competition in the telecommunications industry. These developments may result in the SCC assuming a more significant role in sorting out conflicts between incumbent telephone companies ("ILECs") and their competitors, competitive local exchange companies ("CLECs"). Under the Telecommunications Act of 1996, PL 104-104, codified at 47 U.S.C. §151, et seq. ("1996 Act") ILECs are obligated to, among other things, offer unbundled network elements ("UNEs") to new entrants and to enter into interconnection agreements that allow customers of the different companies to communicate freely with one another. Since the 1996 Act's adoption on February 8, 1996, all efforts, both federal and state, to implement the nuts and bolts of these two requirements have produced little consensus and much litigation. A General Assembly bill just signed into law by Governor Warner ("Commission Responsibilities Statute")¹ and a February 20, 2003 ruling ("February 2003 UNE Ruling")² by the Federal Communications Commission ("FCC") may introduce a new stage in implementing these requirements which enlarges the SCC's role and diminishes the FCC's role.

A. Commission Responsibilities Statute

One unintended consequence of the litigation spawned by the 1996 Act was the sidelining of the SCC. Various federal courts, in reviewing the first round of state commission arbitration determinations pursuant to § 252(e)(6) of the Act, ruled that the state commissions did not enjoy sovereign immunity from suit under the Eleventh Amendment of the U.S. Constitution. Because of concerns that review in federal courts involved its authority to waive or concede Virginia's sovereign immunity, the SCC declined to accept jurisdiction over matters involving the interpretation, enforcement, or arbitration of interconnection agreements under the federal statute. Instead, disputing parties were offered the opportunity to rely exclusively upon state law or to pursue relief at the Federal Communications Commission's ("FCC") under the provisions of §252(e)(5).³ Many parties pursued the latter option and the resulting FCC litigation has been time consum-

ing and expensive for all parties involved.

Based on the notion that the SCC was a more efficient, less costly forum for these kinds of disputes, the Commission Responsibilities Statute permits the SCC to get back into the fray by directing the SCC

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1. Ch. 720 of 2003 Acts of Assembly, to be codified primarily at Va. Code § 56-265.4:4.B.4.
2. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147) adopted February 20, 2003, not yet released, news release available at www.fcc.gov/Daily_Releases/Daily_Business/2003/db0220/DOC-231344A1.doc. The full text of the decision itself has not yet been released, and only bare-bones details are provided by the FCC's press release, an attachment to that press release, and the separate statements of the five individual commissioners. Collectively, these FCC materials are referred to herein as the February 2003 UNE Ruling.
3. See for example, Order of Dismissal entered November 1, 2000, in *Petition of Cox Virginia Telcom, Inc. v. Verizon Virginia, Inc., for a declaratory judgment and conditional petition for arbitration of unresolved issues*, 2000 SCC Ann. Rept. 353 (2000).

VIRGINIA STATE BAR ADMINISTRATIVE LAW SECTION

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Bob Gillespie is a Richmond lawyer who practices telecommunications law. His previous experience includes serving as Senior Counsel at the State Corporation Commission's Office of General Counsel and as Of-Counsel at Christian & Barton, LLP. Bob received both his undergraduate and law degrees from the University of Texas at Austin. This has caused him to become a fan of round balls rather than ellipsoids (namely, baseball and basketball) as he follows his alma mater's pursuit of national sports championships.

FERC Plans for Energy Deregulation Cast Virginia as a Battleground State

by Kenneth A. Barry

This article represents only the view of the author and does not purport to represent those of Hunton & Williams or its clients.

Anyone who wants to understand Virginia's increasingly high profile role in the national debate over the pace of energy deregulation must first understand the Standard Market Design ("SMD") proposal advocated by the Federal Energy Regulatory Commission ("FERC"). This article examines the role of SMD in national energy policy and Virginia's influence on this policy.

FERC's Controversial SMD Proposal

SMD is FERC's most sweeping initiative yet to jolt the electric utility industry into adopting an encompassing structure and rules that would extend the presumed benefits of competition to the masses. Germinated in FERC workshops and advanced by a staff white paper in early 2002, with healthy doses of public input along the way, SMD had blossomed into a full-blown (and massive) Notice of Proposed Rulemaking (NOPR)¹ by mid-summer. Since then, it has been inundated by waves of formal public comment and squalls of both denunciation and praise. FERC is still sorting through the comments and has promised to issue a "second generation" white paper this April that will outline its perspective some nine turbulent months into the journey.²

SMD -- despite its blandly technocratic sound -- has become "fightin' words" for an assortment of stakeholders. In the eyes of its passionate adherents, SMD holds the promise to knit together this country's somewhat haphazardly spliced local and regional power networks into a more coherent, smoothly functioning whole -- with a much smaller number of trans-

regional mega-markets replacing the patchwork quilt of today.³ In this vision, price discrepancies between states or regions would wane; state political boundaries and traditional regulated-monopoly service territories would recede in relevance;⁴ and "economic efficiency" would be the supreme ordering principle -- imposing more rational consumer responses and spurring infrastructure investment by unleashing "market signals." The villain SMD seeks to uproot everywhere is the "market seam" -- shorthand for a shifting amalgam of "pancaked" transmission rates, conflicting local market rules, chronic transmission constraints, and institutional interests that obstruct unified markets and greater economic efficiency. But, to those who are skeptical of the merits of competitive restructuring under SMD, FERC's ambitious agenda threatens to unravel state regulation and consumer protection where they have been most successful -- i.e., in areas of the country that have been blessed, for various reasons, with reliable, moderately priced energy. To them, competitive restructuring of the electric utility industry is something not to be accelerated but to be watched cautiously from afar -- given the early efforts that have roiled West Coast markets and the rarity of sustained success in retail deregulation-- as the learning curve has proved steeper than almost anyone had realized.⁵

The Independent Transmission and Market Operator

At the hub of FERC's industry-transforming vision -- both literally and figuratively -- is the notion of an independent transmission and energy market operator, which would deal with all generators at arm's length. This contrasts sharply with the traditional, pre-restructuring model of the regulated utility as the dom-

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Ken Barry practices energy law in Washington, D.C., with special focus on the restructuring of the electric utility industry. He is counsel with Hunton & Williams' Regulated Industries and Government Relations Group. Prior to 2001, he was for many years Chief Energy Counsel with Reynolds Metals Company in Richmond, Virginia. Ken received his J.D. from the University of Virginia School of Law and received his M.A. in English from the University of Virginia. In his spare time, Ken enjoys bicycling (preferably in Europe), pondering fine points of English literature, and attempting to herd his Shakespearean-named cats Perdita, Miranda, and Robin Goodfellow.



1. The small print version in the Federal Register for August 29, 2002 runs some 140 pages.
 2. FERC's implication is that it will make mid-course adjustments based on what it has heard.
 3. SMD's specific proposals address both transmission *per se* and wholesale markets. Some of these markets are adjuncts to transmission (so-called "Ancillary Services") but others are purely energy spot markets (a "day ahead" and a "real time" version), which would exist side-by-side with "bilateral markets" (deals made outside the framework of the SMD-operated markets). The entire SMD package may be conceived of as FERC's selection of integrated "best practices" in transmission and markets.
 4. Note that SMD does not *require* a state to adopt retail competition; it is, however, a platform designed to *support* retail competition and to end transmission service preferences for bundled retail "native load." Moreover, FERC devoutly believes that competition in generation for the wholesale sector (which it regulates) and the retail sector (which it does not) is the superior economic model.
 5. The Virginia State Corporation Commission's December 30, 2002 report, "Review of FERC's Proposed Standard Market Design and Potential Risks to Electric Service in Virginia" (hereafter, "December SMD Report") notes that early success has been achieved in Texas, but notes no other examples where retail choice has worked well over a prolonged period.

SCC Authority to Fill in Statutory Gaps

by *Brian R. Greene*

A recent Virginia Supreme Court ruling is worth noting because it defers to the expertise of the Virginia State Corporation Commission ("SCC") in addressing issues not contemplated when the General Assembly enacted a particular statute. The case of *Northern Va. Elec. Cooperative v. Virginia Elec. Power Co.*, (Feb. 28, 2003), involved a customer, the Smithsonian Institute, whose property was located partly within the certificated electric service territory of two utilities, NOVEC and Dominion Virginia Power. About two-thirds of the entire site on which the Smithsonian Annex would be located lies within Dominion's certificated territory, but about 95% of the main building and over 95% of the Annex's projected electric load would be in NOVEC's certificated service territory. Each utility claimed a right to serve the Smithsonian and, therefore, the case involved dueling certificates of public convenience and necessity. The hearing examiner, applying a combination of the point-of-use test and the geographic-load-center test developed in previous SCC rulings, recommended that NOVEC have the exclusive right to serve the Smithsonian. However, the Commission did not accept the hearing examiner's recommendations. Instead, the Commission held that where the facilities of a new customer straddle the contiguous service territory of two utilities, and absent customer manipulation, the customer may request service from the utility of its choice. As a result, the Smithsonian was allowed to take service from Virginia Power. The Supreme Court accorded the presumption of correctness to the Commission's decision, holding that "[w]e do not think that the General Assembly . . . could have envisioned the peculiar facts and circumstances of the present case. Consequently, the Commission . . . was required to exercise its broad discretion in order to fashion a fair, reasonable, and practical resolution of the issue at hand." ■

Brian Greene is an associate in Christian & Barton's Energy and Telecommunications practice group. His practice includes representing industrial and commercial customers of electric, natural gas, and water utilities before the Virginia State Corporation Commission, the Maryland Public Service Commission, and the Delaware Public Service Commission. Brian received his B.A. from the University of Virginia and his J.D. from the Washington & Lee University School of Law. Despite graduating from these fine schools, Brian is currently last in his firm's NCAA basketball tournament pool. However, thanks to his 18-month old daughter, Brian can name all four of the Wiggles and sing most of their songs.

"Case Docket Search" (cont. from pg. 3)

requests public comment in a particular case. It allows the average Virginian, when invited by SCC order, to use the SCC web site to submit comments instead of writing a letter and sending it by US mail, walking it to the Tyler Building, or sending it by special delivery carrier.

E-Filing Experiment Continues

The SCC does remind regulated companies, their attorneys, or their regulatory affairs designees of the SCC's continued experiment with electronic filing of case documents. Implemented nearly two years ago, the SCC will accept from authorized filers an electronic file of a case-related document of 20 pages or less.

The web site for instructions and obtaining authorization to file electronically is available on the SCC web site at: <http://www.state.va.us/scc/division/clk/docfile.htm>

Webcasting, too.

Finally, the Internet allows the SCC to webcast the audio of selected SCC hearings. Generally, these are high profile cases with considerable public interest. Such webcasts are especially helpful to Virginians who can't always make it to Richmond for continuation of a hearing in which they commented when the SCC held a local hearing (for example, a high-voltage electric transmission line hearing).

The list of hearings scheduled for webcast and instructions on how to connect to such hearings is available on the SCC web site at: <http://www.state.va.us/scc/caseinfo/webcast.htm>

Cooperative Effort

A number of SCC divisions cooperated to make all of these features available on the SCC website. The Clerk's Office of the Commission is responsible for maintaining all public documents in SCC cases. The Office of General Counsel is responsible for managing the case docket. The Division of Information Technology is responsible for the functionality of the database. The Division of Information Resources is responsible for keeping the public informed of SCC decisions.

These divisions, with direction from the Commission, will continue to use technology to enhance and improve public access to the Commission. Upgrades to the one-year old case management system are already being planned. The ultimate goal is to give authorized filers an unlimited ability to electronically submit case-related documents.

The SCC is an independent department of state government. Its regulatory authority encompasses public utilities, insurance, state-chartered financial institutions, securities and retail franchising. It is the state's central filing office for corporations, limited partnerships, limited liability companies, limited liability partnerships, and Uniform Commercial Code filings. ■

Navigating the Seven "C"s *(continued from page 2)*

2. Consistency. Obviously you have to be evenhanded and measured all the time. You need to be just as interested in my witness who is on at 4:30 in the afternoon as you were in my opponent's witness at 10. Treat men and women the same. Don't discount what people are saying because of their race, accent, age or appearance. Your rulings and demeanor must be consistent.

Practice tip: If you are going to admit to receiving ex parte communications, do not do so on the record.

Practitioner's example: Before [another state's] Public Service Commission we had a very contentious case between two utilities over providing service to a brand new hospital. The case involved territorial issues and corridor rights and we went to the state Supreme Court at least twice and tried the case three times. After the conclusion of the final trial, when the Commission was ready to vote, the Chairman of the Commission started the public meeting by stating on the record: "This has been a very difficult case, and very tough to decide. Both parties came out to my house over the weekend to talk about the case, and now I have to cast my vote." The attorneys for both sides looked at their clients in complete dismay. We told our client never to tell us what he said, but whatever it was, it wasn't enough because we lost.

3. Confidence. Error can be fixed. Doubt is terminal. Confidence in the process is confidence in you. Don't take things under advisement if you don't absolutely have to. Go ahead and make a decision – stick to it, make it final and we'll appeal if we have to. Of course, it is easier to be confident if you are usually right, which in turn is easier if you are well prepared and know your own rules, jurisdiction, authority and duties better than anyone else.

Practice tip: Remember that "the routine is not the rule."

Practitioner's example: In my limited experiences with ALJs to date, I have found that some deal so routinely with a certain agency, issue or statute that they either may not know the full sweep of their jurisdiction, or when an unusual case crops up, they may take it personally, as if someone is trying to pull a fast one on them. Example: We had a case before an ALJ. Both sides first had to persuade the ALJ that yes, the statute said what it said, she did indeed have jurisdiction over our dispute. Once we were before her, it was obvious she wanted to dispose of the matter as quickly as possible so she could return to cases with issues she had experience dealing with. One particularly memorable quote, to illustrate her frustration with being outside of her comfort zone -- my colleague objected for the record to the ALJ's instruction to a particular government witness, which I believe assumed facts not in evidence. The ALJ paused in shock, and

declared, "You can't object to me -- I'm the judge!" Needless to say, things went downhill from there. I think if she had been more familiar with her own jurisdiction, she would have seen cases like ours coming, at least in theory, and would not have acted so flustered.

4. Courtesy. You have the chance, from time to time, to embarrass the lawyers who practice in front of you. I'm not talking about grievous errors or abuses of process, but slip-ups. You get to choose between scoring points or gently but firmly correcting the error and moving on. Try to do what's best for the process and for the confidence of the parties in all the participants. By the way, this works both ways. Civility and courtesy are better for everybody. If we all stand firm, the bad apples will stand out.

Practice tip: Don't forget the "hearing" in hearing officer.

Practitioner's Example: Several years ago I was in an administrative hearing with a judge who was quite elderly and wore hearing aids. About 2 to 3 minutes into the hearing he said "we can begin the hearing now". We suggested that his hearing aid may not be on or working. He turned up his hearing aid and we continued with the hearing. Every since then I have been glad to just have hearing examiners who can hear.

5. Concentration. Focus. I know you want everybody to feel like they've been heard, and we do, too. But there are people with things to say – that they really, really want and need to say – that have *NOTHING* to do with the issues you're charged with deciding. A little bit of this can be ok – it helps encourage participation in important administrative decisions – but don't ever forget what it costs. We get paid by the hour by our clients. Your time and resources aren't unlimited or free, either. And too much extraneous evidence can undermine confidence in the process, even if you are able to discount it and make the right decision.

6. Conclusion. Decide the case. Decide it on the merits and the applicable law. Don't try to split the baby. Pressure to settle is ok – trying to impose a settlement is too much. If a case gets to decision, then the parties have elected to stand on their rights. Don't split the baby – award it.

7. Completion. We know you're overloaded. We know you need to take your time to get it right, but please, please, get your decisions rulings done and out. If the issue is important enough for you to hear, important enough for someone to spend money on a lawyer or even just to take the time to litigate pro se, then it is important enough for you to get the decision out on time or earlier if possible. Impose on the lawyers if you want. Let us write draft orders or your procedural history or anything your agency rules will let you. ■

FERC Plans for Energy Deregulation *(continued from page 5)*

inant generator and owner-operator of the wires, selling consumers a "bundled" product (energy plus delivery⁶). FERC has been whittling away at the traditional model since the late 1980s and particularly since 1996, when its first landmark restructuring initiative for electric utilities, Order No. 888, came on the scene. In that rule-making, FERC ordered vertically-integrated utilities (the vast majority of utilities, which own transmission and most of their territory's generation) to offer a tariff that would allow wholesale customers (e.g., other investor-owned utilities and municipal and cooperative utilities) and retail customers (if and when states elected to restructure retail markets) to use the system to procure competitive generation on a comparable basis to the utility's own use of its system. While "open access" under Order No. 888 did catalyze competition and at least partly leveled the playing field, FERC worried in the ensuing years over whether it had gone far enough. At the federal level, the thought gained currency that the competitive generation model could truly thrive only if the whole transmission system were operated under an open access tariff administered by an independent third party. This concern culminated in Order No. 2000 (issued in late 1999), in which FERC strongly encouraged transmission-owning utilities to either transfer operating control to an independent entity (called a Regional Transmission Operator or "RTO") or, more radically, to spin off their transmission assets into independent ownership for inclusion in an RTO. RTOs would then operate and help plan growth for a number of smaller systems -- molding them into an integrated, "seamless" system with a single, "un-pancaked" transmission rate, thereby facilitating larger markets.

In the year or so following Order No. 2000, FERC cajoled and prodded "standalone" utilities to form RTOs, while also urging already-formed, independently operated systems (generally called Independent System Operators ("ISOs"), which emerged in the Northeast and California following Order No. 888) to fuse into still bigger entities. But in 2002, with RTO formation going slowly⁷ and new transmission construction still lagging in many areas, FERC drew a larger gun. Emboldened by a U.S. Supreme Court decision in early 2002 implying that FERC could, if it wanted to, assert jurisdiction over transmission even where states had not enacted retail competition and "unbundled" transmission from generation,⁸ FERC unveiled the SMD NOPR as an intensified, more comprehensive program for (1) universally placing transmission service in the hands of third party administrator-operators disinterested in the generation market; and (2) making service to transmission-only customers fully comparable to the quality of service afforded to bundled retail loads. While there is, to be sure, a lot more to the SMD NOPR than extending the frontiers of FERC's jurisdiction, that immediately caught a great deal of attention. Commissions in states

that had not yet unbundled electric power or embraced retail competition recoiled collectively at the notion of FERC regulating not only wholesale sales and unbundled transmission -- its clear statutory province -- but also the transmission aspects of retail bundled service, the last refuge of pervasive state control. Commissioners in the Southeast and Pacific Northwest, in particular, dug in for an extended turf war with FERC.⁹ State regulators worried that if FERC completely regulated transmission, responsibility for local reliability would slip out of their hands, while relatively stable, price-regulated services -- based on long-term averages of actual costs -- would become much more volatile as FERC would price some components of transmission service (e.g., transmission "congestion management" and the balancing of actual hourly energy loads with schedules submitted in advance) using more transient "locational marginal pricing" (LMP) based on market bids.¹⁰

Virginia at a Critical Juncture

Virginia, in a not unfamiliar role, has found itself pulled in two directions and has increasingly become a battleground state. On the one hand, it committed itself in 1999 restructuring legislation¹¹ -- unlike the other 11 southeastern states -- to a path towards retail competition. The Virginia State Corporation Commission ("SCC") became the principal forum for implementing the details of retail choice, including the unbundling of generation, transmission, and distribution functions, and in 2002 it began a phase-in of retail choice that is well under way. On the other hand, the lack of success retail competition is seeing across much of the country (including a disappointing start in Virginia) -- coupled with serious financial distress in many sectors of the post-Enron, post-California utility world -- struck the SCC as an unpromising backdrop for the initiation of SMD, with its additional dramatic restructuring and perhaps irretrievable loss of local control. Taking stock at the end of 2002, the SCC issued its December SMD Report. In it, the SCC

— *continued on next page*



6. "Delivery" includes, of course, both transmission and distribution -- which are generally viewed as separate functions in unbundling and then fall under different jurisdictional regimes. But for simplification, we generally refer to "transmission" in this article without drawing this distinction.

7. Ironically, not only some investor-owned utilities but major federally-owned systems in the West have been cautious about leaping into RTOs, contributing to the slow progress.

8. See *New York v. FERC*, 535 U.S. 1 (2002). The Court held that FERC (and not the states) could regulate unbundled "retail" transmission under the Federal Power Act. In *dicta*, it further suggested that, based on an appropriate finding of "discrimination," FERC could also regulate the "transmission component" bundled into retail service.

9. The seriousness of the confrontation is evidenced by a joint letter from the commissioners of 11 southeastern states dated February 21, 2003 to the Chairman of FERC. It advises that, as a threshold matter, before they would agree to deliberate the merits of SMD's particulars, FERC would have to agree, among other things, not to assert regulation over the bundled transmission in retail services to native load.

10. LMP is a core concept of SMD. It worries some state commissioners as yet uncomfortable with market-based pricing because, even if states choose to maintain a traditional model with a regulated monopoly providing generation at cost-based rates, FERC's assumption of transmission jurisdiction will inject more volatile, market-based *generation costs* into the total service cost because, as noted above, SMD and LMP make significant use of market bid-based generation to price some elements of *transmission* service. While Congestion Revenue Rights are SMD's own answer to the risk of LMP-based congestion charges (by giving customers a financial hedge to offset them), there is some uncertainty over how long "historical" system users will be permitted to retain these rights.

11. See Virginia Electric Utility Restructuring Act, Code of Virginia § 56-576 et seq.

FERC Plans for Energy Deregulation *(continued)*

first described its substantive concerns about the economic wisdom of SMD and then forewarned the General Assembly that two requirements already embedded in the 1999 restructuring law would almost certainly ensure that FERC would soon gain untrammelled control of transmission in Virginia. These requirements were (1) that Virginia utilities functionally unbundle their rates (making transmission a separate service); and (2) that Virginia utilities must join independent regional transmission entities by a date certain.¹² The SCC advised the General Assembly to consider the perils the SCC had sketched out¹³ and, if the General Assembly agreed with this assessment, then the General Assembly should amend the 1999 law to (a) reverse the unbundling of functions and (b) defer the mandate to join an independent transmission entity. The General Assembly did only the latter -- establishing January 1, 2005 as the new date by which utilities must join independent transmission entities -- but, in an important shift, declared a moratorium on state utilities joining such entities until mid-2004. The 2003 amendments also restated the SCC's authority to approve any proposed transfer of transmission control or assets to independent entities and, to aid in the SCC's review, required that a Virginia customer cost/benefit analysis be included with any transfer application.¹⁴

A Jurisdictional Collision is Set in Motion

The saga does not stop there. The Virginia law placing new hinges on the structure by which the state will reform its electric utility industry raised a major jurisdictional row at FERC. In mid-March, the commissions of Pennsylvania, Ohio, and Michigan -- along with Commonwealth Edison (which is hoping to join PJM, the same independent transmission entity two major Virginia utilities were seeking to join)¹⁵ -- filed motions before FERC protesting the Virginia "maneuvers" and asking FERC to hold them constitutionally incompatible with FERC's exclusive jurisdiction under the Federal Power Act. In essence, their argument is that (a) FERC exercises sole jurisdiction over transmission; and (b) Virginia's autonomous review of the merits of a utility joining an independent transmission entity would undercut Congress' grant of that jurisdiction to FERC. Actually, Commonwealth Edison's pleading points out that no less than six states are holding proceedings to consider AEP's joining PJM, but the utility evidently finds Virginia's review the most blatantly obstructionist. Commonwealth Edison contends that the SCC and General Assembly would hamstring the ongoing federal review process by "attempting to hold PJM expansion hostage to a final rule in the SMD proceeding that would be acceptable to Virginia."¹⁶

The strong protests of the northern states and Commonwealth Edison -- urging FERC to take control and assert exclusive jurisdiction over the process for forming RTOs -- sets the stage for a classic,

if complicated, federal-state jurisdictional battle. The issues are two-fold and go straight to the extent of Virginia's sovereignty over the matter. First, FERC has taken an aggressive jurisdictional stance versus the states in its SMD NOPR, drawing inspiration (as earlier noted) from the Supreme Court's observations in *New York v. FERC*. For its part, the SCC has acknowledged in its December SMD Report that the 1999 Virginia restructuring law exposes the state to broader FERC jurisdiction; and, even if the General Assembly repairs the two main chinks in Virginia's armor (which it has done only partially in the 2003 amendments), FERC's assertion of comprehensive authority might nonetheless be upheld in the federal courts. In addition, on a parallel track, we have the directive of the General Assembly (explicit in both the 1999 act and the 2002 amendments) that the SCC should have one last say on whether any concrete proposal of a Virginia utility to join an independent transmission entity under FERC jurisdiction is in the best interests of Virginia consumers. But at least one out-of-state utility and three other state commissions are saying, loud and clear, that Virginia cannot constitutionally do this; that there are profound multi-state ramifications to the scope and characteristics of a regional transmission entity, on which FERC alone can make the judgment call. By holding its own proceeding, they argue, Virginia would be end-running the process at FERC, where Virginia is welcome to make as much input as it likes.

Conclusion.

Whether a state may have concurrent jurisdiction with FERC to review the proposal of a utility franchised to serve within its borders to join an independent, FERC-regulated transmission entity is an interesting and serious question. Likewise, whether FERC can regulate the transmission component of bundled retail sales raises difficult questions of statutory interpretation -- as the Court itself acknowledged in *New York v. FERC*. Absent political compromise or Congressional action, FERC is likely to be tilting with Virginia and other states over these critical jurisdictional questions for some time to come. ■



12. In fact, the date established in the 1999 law had already passed. In 1999, the slowness of the RTO formation process had not been anticipated. Hence, joining a regional transmission entity is already overdue, under the law.

13. In brief, the SCC was concerned that the physical infrastructure serving the state was designed to meet customer demand under the regulated monopoly model with "just enough" capacity, while the competitive model, to ensure effective price competition, requires many sellers and buyers and a much larger infrastructure capacity (both transmission and generation). Absent massive additional capacity investment, the SCC fears market power will often ensue and FERC's reliance on market power mitigation tools would prove unequal to the daunting task. Also, the SCC, among other concerns, felt that a preference in quality of service for "native load," which SMD proscribes, is a legitimate state objective.

14. As of the date of this article, the gestation of the 2003 amendments to the 1999 restructuring law via H.B. 2453 is not quite complete. The Governor has yet to sign the bill, and has been requested to propose an amendment *rebundling* the energy and transmission functions. He has not complied with this request, but has added an emergency clause so that the bill would go into effect on April 3, 2003 rather than July 1, 2003.

15. PJM was formally approved by FERC as an RTO in late 2002. Dominion Virginia Power and American Electric Power Corporation (AEP), both with extensive operations in Virginia, have signaled their intent to join PJM over the last year.

16. Motion of Exelon, *et al.*, FERC Doc. No. ER03-262-000 (Mar. 17, 2003) at p. 9.

Will the SCC Suitout for Telecom Battles? *(continued from page 4)*

to "...discharge the responsibilities of state commissions as set forth in the Telecommunications Act of 1996" The Commission Responsibilities Statute basically gives the SCC flexibility to determine how much it wants to expand its role in arbitrating interconnection disputes and perhaps other matters as well. The bill specifically mentions the arbitration of interconnection agreements, but that example is not listed as "limiting" the SCC's responsibilities. The precise meaning of what constitutes the "...responsibilities of state commissions..." is unclear and various segments of the telecommunications industry will assign it different meanings. The most restrictive interpretation would argue that the responsibilities of state commissions under the 1996 Act are all confined exclusively to §252 of the 1996 Act, which addresses the negotiation, mediation, arbitration, and approval of interconnection agreements. A more expansive interpretation would argue that the responsibilities of state commissions also encompass §251 of the Act, which addresses interconnection duties and obligations, including access to unbundled elements and collocation. In support of the more expansive interpretation, it is worth noting that state commissions have been called upon to exercise authority under various sections of the Act, to include consulting with the FCC as provided under § 271(d)(2)(B) "...to verify the compliance of the Bell operating company..." with the 14-point checklist prior to the FCC's granting long distance authority to that Bell operating company.

Ultimately, the Commission Responsibilities Statute permits the SCC to determine how to expand its role as the SCC "...exercise[s] its discretion to defer selected issues under the Act." This grant of broad discretion indicates that the General Assembly wants the SCC to participate, but not to reach farther than it can grasp. Thus, ILECs and CLECs can argue their own positions on how deeply the SCC should involve itself, but the SCC has virtually free rein to develop its own boundaries. The General Assembly has answered the question of whether the SCC will be involved, but not the question of the degree of that involvement. To bolster the SCC's exercise of its discretion, the General Assembly explicitly authorized the SCC to exceed the 0.2% cap on the special regulatory tax as set out in Va. Code § 58.1-2660.A. In other words, costs the SCC might incur in arbitration, litigation, or even appeals need not crimp the SCC's ability to participate. The SCC is permitted to set a higher tax rate when additional funds are needed to cover the costs of implementing the Commission Responsibilities Statute.

B. February 2003 UNE Ruling

At the same time the General Assembly was expanding the SCC's involvement in resolving disputes between CLEC and ILECs, the FCC indicated its intention to give state commissions a larger role in establishing how ILECs had to share their networks with CLECs. On February 20, 2003, the FCC issued the February 2003 UNE Ruling

in its closely watched Triennial Review, which called upon state commissions to decide instances of market "impairment" that require ILECs to offer specified unbundled network elements to CLECs. In a surprising 3-2 vote, Republican Commissioner Martin joined the two Democratic commissioners, Capps and Adelstein, in calling upon state commissions to make the determinations of "impairment" when an ILEC withholds an element from a CLEC, under the terms of § 251(d)(2)(B) of the Act. Determinations of "impairment" are crucial to many CLECs because such determinations permit them to purchase UNEs from an ILEC at less than tariffed prices and then repackage them for sales to CLEC customers. Speculation is rife as to the actual role to be played by the state commissions, how the decision will hold up under appellate review, and whether this might be another half-hearted attempt to forge a federal/state partnership in which the FCC partners with states to implement the objections of the 1996 Act.

Although the February 2003 UNE Ruling calls for state commissions, rather than the FCC, to make determinations of impairment, the ruling indicates that ILECs broadband loops are essentially off the table. The ruling says that ILEC have no obligation to unbundle these items, and the FCC retains jurisdiction over broadband. Over Chairman Powell's and Commissioner Abernathy's dissents, the FCC reversed its earlier determination requiring the sharing of ILEC DSLs. This ruling prevents state commissions from considering treatment of the high frequency portion of a copper loop and also jeopardizes the capability of many CLECs to offer customers broadband ISP connections. It should, however, ultimately lead to a single, national policy addressing the disparities between broadband services as offered by telephone companies and as offered by cable and wireless providers.

For network elements other than broadband loops, the FCC has called upon the states to sort out difficult criteria that determine when an ILEC's withholding of unbundled switching, loops, and transport will result in CLEC impairment. For the switching furnished to business customers served by high capacity loops, the FCC found no need to retain a national presumption that such switching must remain unbundled in order to avoid impairment. State commissions are free to rebut (within 90 days of a still unnamed date) this finding.

For mass-market customers (presumably residential and low-capacity business customers), the FCC will furnish specific criteria for the states to use in determining on a market-by-market basis, whether economic or operational impairment exists if unbundled switching were to be withheld. The state commissions have nine months to complete these proceedings. If a state commission finds no impairment, CLECs have a 3-year grace period to transition off of their current mode of combining unbundled switching with loops and trans-

Will the SCC Suitout for Telecom Battles? *(continued)*

port to furnish a package of end-to-end service.

Concerning loops (the dedicated facilities that tie the customer's wiring to the ILEC's switching equipment), the FCC did not assign the state commissions significant duties. ILECs were told not to retire any mass-market copper loops without first receiving approval from the state commission. In revoking the ability of CLECs to rent the high frequency portion of the loop from the ILEC as an unbundled element, the FCC reasoned that the capacity to rent the entire stand-alone loop (i.e. to convince the customer to transfer all services, voice and data, to the CLEC) alleviates any impairment. The FCC established a three-year timetable for CLECs to transfer their existing customers from the high frequency service to new arrangements. During that three-year period, the price of the high frequency portion will be raised towards the cost shown for the entire stand-alone loop. The February 2003 UNE Ruling also states that ILECs have no unbundling obligations for the packet-switching features, functions, and capabilities of hybrid loops or for fiber-to-the-home loops.

The FCC ruling also indicates that two portions of its TELRIC rules will be clarified. The risk-adjusted cost of capital used in calculating the prices of unbundled elements should reflect the risks associated with a competitive market. Does this mean that different costs of capital will be assigned to different elements based upon the perceived differences in the competitive risks faced by those elements, or will the risks of competitive markets be appraised and applied across the board for all elements? The attachment to the press release in the February 2003 Unbundled Ruling ("Attachment") reiterates from the original

BROWN BAG LUNCHEON PROGRAM

The Section's latest Brown Bag Lunch Program takes place on April 11th in Richmond from 12:05 p.m. to 1:35 p.m. in the Second Floor Conference Room of the 8th & Main Building (where the VSB offices are located on the 15th floor). Section members will have an opportunity to interact on an informal and inexpensive (\$15) basis while attending a CLE program. If you'd like to suggest topics for future Brown Bag Luncheon Programs, contact Jim Guy at jguy@leclairryan.com. ■

NRC in Williamsburg *(cont. from pg. 1)*

but certainly not least, the ever popular ethics panel returns as Jim Guy leads a discussion on the general counsel's role in a troubled industry.

Please join members of the administrative bar, the SCC staff and Commissioners, and representatives from regulated industries in Williamsburg on May 5 and 6, 2003. ■

Local Competition Order that the cost of capital may be different for different elements, so competitive risks might need to be assessed differently not only for each element, but also for each market in which that element is used. The Attachment also states a preference for the use of accelerated depreciation in calculating economic depreciation. The Attachment concludes with the opening of a further notice of proposed rulemaking to revisit the FCC's pick-and-choose rule—47CFR §51.809.

C. Implications for the Future

The slump and shakeout of the telecommunications industry is not yet over. But that does not mean that the industry is standing still. Fewer companies exist, but those few are probably grounded upon better foundations and less subject to marketplace whims, speculation, and manipulation than the recently failed dotcoms and start-ups. Surviving companies are reviewing their assets and strategies, consolidating their strengths, and jockeying for position even while their ability to raise capital is diminished. The General Assembly has directed the SCC to weigh-in and play a role in implementing the 1996 Act. The FCC has identified unbundling issues where it needs and seeks state assistance. We do not know how many or which issues the SCC will take on, but the door has been opened for this important player to return to the field and see if it can advance the ball in competitive telephony. ■

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