

# Administrative Law News



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## MESSAGE FROM THE CHAIR

I am pleased to welcome J.P. Jones, Eric Page and Steven Myers to the Board of Governors. I must report to you that all three new members wasted no time in getting to work on projects for you. J.P., as you can tell from the newsletter, is our new editor and has done a tremendous job putting together information of interest to all of us. Steven is our new liaison with the Virginia Association of Administrative Law Judges and Hearing Officers. Eric is hard at work on the planning committee for this year's National Regulatory Conference. It is great to have these fine attorneys on the Board.

The new year is well under way, as are plans for several important Administrative Law Section meetings. The Thirteenth Annual National Regulatory Conference is scheduled for May 8 and 9, 1995 in Williamsburg, Virginia. The conference is co-sponsored by the Administrative Law Section, the

Virginia State Corporation Commission and the Marshall-Wythe School of Law, College of William and Mary. Every year the conference focuses on a different regulated industry. This year Stephen Watts and his able committee are busy finalizing a roster of knowledgeable panelists and speakers to explore the regulatory aspects of the new competitive energy markets. It should prove to be a stimulating conference, so mark your calendars.

Charles Koch, Jr. has already made plans for this year's administrative workshop on June 16, 1995 at the Virginia State Bar Annual Meeting in Virginia Beach. Charles will bring together three distinguished panelists who will give us guidance for representing clients on disability issues, particularly related to the Americans With Disabilities Act. More information can be found in this newsletter.

We are also making an effort to plan a dinner meeting with the Virginia Association of Administrative Law Judges and Hearing Officers with a speaker on a topic of mutual interest to both of our groups. Information about the meeting will be provided to you as it becomes available.

I would like to express my appreciation to all of the members of the Board of Governors. They have all been hard at work organizing programs for you and ensuring information of interest to all of us is made available. However, we encourage your ideas, so if there are activities which you believe we should be working on, please let us know. After all, this is your section and we all will benefit from your active involvement. We look forward to seeing you soon.

Deborah Vinson Ellenberg  
Section Chair

### NEW WAYS OF REGULATING LOCAL PHONE COMPANIES AND A WORD TO THE WISE FROM THE SCC

Competitive local phone service is coming, and with it, relaxed rate making. As this newsletter goes to press, it looks like the Governor will sign a law amending Section 56-265.4:4 of the Utility Facilities Act. The amendment authorizes the State Corporation Commission to grant certificates to more than one local exchange telephone company serving the same territory, so long as affordability of local service is reasonably protected, the continuation of quality local service is reasonably assured, no class of customers or providers is unreasonably prejudiced or disadvantaged, and the public interest is served.

The new law lets the Commission introduce competition under the same conditions imposed in Section 56-235.5 by the General Assembly in 1993 for introducing non-traditional, or market, regulation of rates charged by local telephone exchange companies serving exclusive areas. With this legislation, Virginia will join several other states in allowing competition in the local telephone service market.

Last fall, the Commission took advantage of its new power to abandon traditional rate making. By an order on October 18, 1994, the SCC adopted new approaches to overseeing the prices charged by local exchange telephone companies. The order set temporary price caps on essential and certain optional telephone services, while it left the pricing of other telephone services completely to market influence. The SCC's chairman, however, filed a 46-page dissent sharply criticizing the order.

The new approaches to local phone service price regulation actually included a different plan for each of the three major local service providers in Virginia. At the Commission's invitation, each company proposed its own scheme of regulation. With some changes, the Commission approved all three, finding each satisfied the General Assembly's four conditions for dispensing with traditional rate

making. As a result, each provider then became regulated according to its own plan. Bell Atlantic and United/Centel (Sprint) proposed price indexing plans, while GTE proposed an earnings regulation plan based on an experimental plan in effect from 1989 to 1993.

For basic telephone services, the price indexing plans freeze prices until 1998 for Sprint customers, and until 2001 for Bell Atlantic customers. Thereafter, both providers are permitted to raise prices periodically, but only by a fraction of the rate of inflation. For so-called "discretionary" services, such as Caller ID or Call Waiting, the price indexing plans freeze prices for a shorter period and allow larger rates of increase thereafter. The plans also allow both companies to alter prices of both basic and discretionary services as long as overall revenues do not change and the Commission agrees. For services deemed competitive, such as paging, public telephone placement, and yellow pages advertising, the plans eschew price regulation entirely, permitting the market to operate without interference. Other major features of the plans include the removal of charges for Touch Tone service and the expansion of the Virginia Universal Service Plan to food stamp recipients.

Chairman Moore dissented from the order. In his view, the price indexing plans afforded too much discretion to providers too soon, before competition could develop as an adequate alternative for protecting customers. He opposed the freeze of rates for basic services because he felt current price levels had not been fully examined, leaving open the possibility that the prices fixed by the plans were really too high. He therefore found insufficient evidence for the Commission's conclusion that current prices for basic services satisfied the affordability requirement of section 56-235.5.

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Chairman Moore also opposed the price increase provisions for discretionary services. In his opinion, the affordability of such services is not yet ensured by the interplay of market forces. "[C]onsumers face two choices [, t]hey can do without useful and innovative discretionary services, or they can risk being gouged."

The Commission also divided on the desirability of mandating upgrades to existing infrastructure, as some other states have done when approving similar pricing plans. For the majority, infrastructure upgrades are adequately assured by the coming competition, and a mandate to use a particular technology could prove more harmful to the state in the long run. For Chairman Moore, the present, undeveloped state of such competition rendered such mandates prudent for protecting the quality of local service.

In the section of its order described by the Commission as addressing "regulatory safeguards applicable to alternative methods of telephone company regulation," the Commission called to the attention of the three local exchange telephone companies the clash between the electrical utility, Virginia Power, and its corporate parent, Dominion Resources, and to the two cases related to that clash then pending before the Commission. The Commission then reminded both the Virginia telephone utilities and their foreign holding companies that article IX, section 5 of Virginia's constitution prohibits foreign corporations from carrying on the business or exercising the powers of a public service enterprise. The Commission also referred to Section 13.1-620 of the Virginia Code, which provides that no corporation can conduct business or avail of the privileges of a public service company unless its articles of incorporation specify such a purpose. The last, cryptic paragraph of this section bears quotation:

Certainly the present proceeding implicated few, if any, issues and legal provisions of the type mentioned above, and we consequently take no substantive action or position in this case related

thereto. We do, however, highly commend such matters to the attention of the telephone companies here, and their parents. We will be monitoring carefully all information relevant to this subject, and we will make formal inquiry of such issues as appropriate. These concerns will clearly form part of the backdrop as we carry out our on-going responsibilities under Virginia Code section 56-235.5, especially subsections D (amendment or revocation of alternative regulatory methods previously approved), G (declassification of competitive services), and H (safeguards).

Among other reactions to this cautioning worth noting was that of Frank B. Atkinson, Counsel to the Governor, who wrote to the Commission's Director of Information Resources that the order "raised the specter that the Commission will assert expanded jurisdiction over heretofore non-regulated holding companies that have regulated utility subsidiaries." Mr. Atkinson went on, "Whatever may be the Commission's intentions and ultimate action on that particular issue, it is illustrative of the kind of regulatory matters that could potentially have a far-reaching impact on the perception of the Commonwealth's business development climate by business leaders and potential investors within our state and beyond."

[In our next issue, we will review the 1995 session of the General Assembly, including bills proposing changes in the Commission's supervisory powers relevant to public utilities. --ed.]

**STATE CONFERENCE ON ADMIN.  
PROCEDURE SET FOR MAY 16-17  
IN RICHMOND**

The Virginia Code Commission's Administrative Law Advisory Committee [ALAC -- see last issue] will sponsor a conference on Administrative Law in Virginia on May 16 and 17, at the University of Richmond's T.C. Williams School of Law. The conference is intended as a forum for improving the Commonwealth's administrative processes, offering both a catalyst for reform and classroom for education. While open to all with an interest in the processes of administrative government, the conference ought to particularly attract members of our section. Application for approval of this program is pending with the Virginia Mandatory Continuing Legal Education Board.

The Conference will cover the processes of rule making, case deciding, and judicial review. Specific topics within those areas are being refined by reference to an interest survey conducted last Fall by ALAC. Responses to the survey came from professionals in state and local government, attorneys in private practice, association executives, elected officials, judges and hearing officers. From the Conference, ALAC hopes to take to the Code Commission both suggestions for further ALAC study, and specific recommendations for legislative action.

The Administrative Law Advisory Committee anticipates an active exchange of ideas during the two-day gathering. Conference participants should be prepared to contribute to a broad-based and lively discussion, and to help formulate specific recommendations for the Code Commission. Attendance will be limited to the first 200 registering, so sign up promptly to assure admission. Contact Lyn Hammond, Administrative Law Advisory Committee, General Assembly, Building, 2nd Floor, 910 Capitol Street, Richmond, VA 23219. Her telephone number is (804) 786-3591, and she takes faxes at (804) 371-0159.

**ALJ'S TO GATHER IN WILLIAMS-  
BURG NEXT FALL**

From Mike Oglesby, President of the Virginia Association of Administrative Law Judges and Hearing Officers (VAALJHO), comes word that Virginia will host a Joint Annual Conference of the National Association of Administrative Law Judges (NAALJ) and the National Association of Hearing Officials (NAHO) in Williamsburg, October 14-18. VAALJHO's own annual meeting will coincide with the NAALJ/NAHO Conference.

**ALJ Contempt Powers in Missouri**

The most recent (January 1995) issue of NAALJ News called to the attention of its subscribers *State ex rel. Chassaing v. Mummert*, 887 S.W 2d 573 (Mo. banc 1994). In that case, an attorney sought from the Supreme Court of Missouri a writ of prohibition to halt contempt proceedings against him in circuit court. The charge stemmed from a workers' compensation hearing in which the attorney had appeared before an administrative law judge of the Missouri Department of Labor and Industrial Relations. Missouri's administrative Process Act authorizes an agency to apply to the circuit court for an order to show cause why a person should not be held in contempt for conduct during an administrative hearing which would be contempt if it occurred in the hearing of a civil action before the circuit court. The circuit court quashed the attorneys subpoenas for notes taken by the special assistant attorney general of meetings with the agency's ALJs and the attorney's deposition notices served on the ALJ presiding over the agency hearing, the acting Chief ALJ who intervened, and the Chief ALJ to whom both later reported. The circuit court treated the special assistant attorney general's notes as protected by the attorney-client privilege, and found that deposition discovery was not authorized in criminal contempt proceedings.

The Supreme Court granted the writ, holding unanimously that the attorney was entitled to both the attorney general's notes and the ALJs' depositions. Analogizing the special assistant attorney general to a prosecutor in an ordinary criminal prosecution, the court found that neither the attorney-client nor the work product privilege could protect his notes, for neither the ALJs nor the agency were his clients. As for the depositions, the Court construed its Rule affording defendants charged with indirect criminal contempt "a reasonable opportunity to meet [such charges] by way of defense or explanation" as implicitly affording some deposition discovery, the extent of which the Court left to the discretion of the circuit court.

### WHERE TO APPEAL IN VIRGINIA FROM A CIRCUIT COURT'S ORDER IMPLEMENTING GRIEVANCE PANEL DECISION

In *Department of Taxation v. Daughtry*, 19 Va. App. 135 (1994), the Court of Appeals refused to treat a circuit court's order implementing a grievance panel decision as the final decision of a circuit court on appeal from an agency decision. For that reason, the Court of Appeals found itself without jurisdiction to review the circuit court's order, and ordered the case transferred to the Supreme Court. Judge Willis wrote for the Court of Appeals that the circuit court proceeding provided in section 2.1-114.5:1(F) was "collateral and independent ... analogous to a proceeding to domesticate and enforce a foreign judgment ... [rather than] an appeal from the grievance panel's decision." For this reason, the case could not be heard by the Court of Appeals as an appeal from the final decision of a circuit court on appeal from a decision of an administrative agency, as provided in Section 17-116.05. Benton, J., and Elder, J., concurred.

### NATIONAL REGULATORY CONFERENCE SET FOR MAY 8-9 IN WILLIAMSBURG

The SCC, our section, and the Marshall-Wythe School of Law at the College of William and Mary are again sponsoring The National Regulatory Conference. Planned by Stephen Watts, Louis Monacell, and Eric Page, this year's conference, "State Regulatory Aspects of Competition in the Energy Marketplace" will convene at the law school in Williamsburg on May 8 and 9. Eric has negotiated a special rate for accommodations at the nearby Fort Magruder Inn for those attending, and shuttle buses will operate between the inn and the law school on both days. Watch your mail for a brochure.

### WHEN ATTORNEY'S FEES ARE UNRECOVERABLE OVERKILL IN VIRGINIA

In *Greenwald Cassell Associates v. Department of Commerce*, 15 Va. App. 236 (1992) the Court of Appeals affirmed a decision of the circuit court that a cease and desist order, although not authorized by statute, was nevertheless an appealable case decision of the Department of Commerce. The Court of Appeals, however, then reversed the circuit court's subsequent decision to dismiss the appeal for failure to exhaust administrative remedies and to deny attorney's fees, remanding for the court below to set aside the cease and desist order and to reconsider the request for attorney's fees. On remand, the circuit court awarded \$8,000, eight per cent of Greenwald's original request. Greenwald then appealed.

In *Greenwald Cassell Associates v. Guffey*, 19 Va. App. 179 (1994), the Court of Appeals affirmed, per Moon, C.J., holding that Greenwald had failed to carry its burden of proving any more would be reasonable. Baker, J. and Fitzpatrick, J., concurred. The court below had found the hours claimed unreasonable on their face and overkill, especially since the real issue of the dispute -- whether the company

could use the word "architect" in its advertising -- remained undecided. Concluding that an application for fees from state coffers necessitates the same "careful scrutiny" given applications for fee awards from the federal treasury, the Court of Appeals declined to find the circuit court had abused its discretion in this case.

### **VBS ANNUAL MEETING OFFERS ADVICE ON REPRESENTING CLIENTS WITH DISABILITIES**

Guidance for representing clients with disabilities, particularly under the Americans with a Disability Act (ADA), will be presented by the administrative law section at the annual meeting June 16, 1995 at 10:45 a.m. William and Mary Professor Charles H. Koch, jr. will moderate a program with presentations by Mr. James Rothrock, Ms. Diane Baun, and Professor Ann C. Hodges.

A number of federal and state statutes provide protection for those with disabilities but the ADA is by far the most comprehensive and sweeping. The ADA prohibits discrimination in employment, in public services and public transportation, in public accommodation, and in telecommunications. Those protected include not only those with substantial impairments but those who once had such impairments as those "regarded as" having such impairments. In short, the ADA has extremely broad application.

James Rothrock is president of Rothrock Group in Richmond, a firm specializing in the ADA, Worker's Compensation and other disability-related matters. He will discuss the broad topic of "making a law practice accessible to people with disabilities." He will offer general guidance as to improving service to clients with disabilities as well as practical and cost-effective methods whereby a law practice itself can comply with the ADA. Specific attention will be given to dealing with "undue burdens", tax incentives, and marketing strategies to tap the market of potential clients who have disabilities.

Diane Baun is an attorney with Woods, Rogers & Hazlegrove in Roanoke. She will focus on the employment aspects of ADA. Her presentation will elaborate on how the ADA will affect lawyers in representing their clients and as employees themselves. It will provide an overview of the requirements of the employment provisions of the ADA and highlight the pitfalls that practitioners should guide their clients past.

Ann C. Hodges is a Professor of Law at the University of Richmond. She is also a consultant for the Administrative Conference of the United States on ADA dispute resolution. Her presentation will focus on existing dispute resolution mechanisms under the various ADA titles, including employment and accommodation. It will enable lawyers to represent clients through these existing processes and to identify alternative methods of resolving ADA disputes which may be quicker and less expensive.

### **From the Editor:**

While this winter was only the second warmest in recorded history when measured by ambient temperature, it must also have been one of the warmest if measured in administrative procedure bombast. Led by Speaker Gingrich, the new Republican leader of the U.S. House of Representatives called for a moratorium on environmental and safety regulations, cost benefit analysis across the regulatory spectrum, and a super oversight committee staffed by small business representatives. Newt himself talked about setting aside one day each month during which the Congress would "correct" mistakes by federal administrative agencies. Various pundits, members of Congress, and other public figures called for the elimination of cabinet-level departments, such as Education and Veteran's Affairs. "Sea-change" seems both premature and over-used, but the frequency with which it comes up evidences the mood, if not the product, of the new majority in the national legislature.

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The same spirit fomented in Richmond. Governor Allen appointed a Blue Ribbon Strike Force to review the state of the regulatory state in Virginia, and the Code Commission's Advisory Committee on Administrative Law began work as the Commonwealth's think tank for administrative reform. Offering a concrete example of what Newt might have in mind for Congress each month, State Senator Charles Waddell threatened to introduce in the General Assembly legislation to overturn a decision by the Health Commissioner that Loudoun County did not need a 55-bed rehabilitation hospital. Various proposals surfaced for limiting the powers of the SCC in light of the Dominion Resources/Virginia Power feud. Meanwhile, Brian Buniva lobbied for uniform standards of judicial review from final agency decisions, including a uniform test for standing and Bob Adams called for emergency relief for citizens done wrong by state agencies.

It would be naive to sum these initiatives as the re-politicization of the American bureaucratic state,

but I find myself reaching as far back as Andrew Jackson's administration for historical examples matching the anti-bureaucratic fervor of the new populists in national government. Perhaps others can point to Virginia precedent as well. However they are cast, these influences are surely upon us, and I invite section members to contribute to their assessment in future issues. Have you an opinion on the proper form of public participation in rule-making, on the appointment of citizen members to regulatory boards, on the independence of one or more regulatory agencies from executive control? Would you like to see some change to the way agencies confer or revoke licenses, set or permit prices, dispense or collect public funds? Does a recent case present a long-overdue precedent or should it be dismissed as an undesirable sport?

Write to me at the law school, send a fax, or transmit an E-mail message. I look forward to hearing from you.

-- John Paul Jones  
FAX: (804) 389-8683  
Jones@UofRLaw.Urich.edu

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### MEMBERSHIP APPLICATION

The Administrative Law Section  
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