

# Administrative Law News

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## Transmission Line Applications – A Brave New World?

By Michael J. Quinan and Cliona Mary Robb

As of this writing, the State Corporation Commission (“SCC” or “Commission”) is considering Hearing Examiners’ Reports on two separate applications by Dominion Virginia Power for certificates to build transmission lines in northern Virginia: the Pleasant View-Hamilton 230 kV line in Loudoun County (SCC Case No. PUE-2005-00018) and the Garrisonville 230 kV line in Stafford County (SCC Case No. PUE-2006-00091). The issues raised by the parties and addressed by the

Hearing Examiners are familiar to anyone who has tried a transmission line case in anything that might be considered recent memory: need, routing, property values, health impacts and mitigation measures. The Commission has certainly heard it all before.

There are, however, factors at play that are putting those issues in a new light, and that may result in rulings that are surprising – or that would have been surprising even a short time ago. One of

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## Nuclear Generation: Poised to Be the New Comeback Kid?

By Kenneth A. Barry

### Background

Surely no generation technology has experienced wider swings in the pendulum of public favor than nuclear energy. In the dawn of the Atomic Age – stretching from the late 1940s well into the 60s – nuclear energy looked to be an inexpensive, virtually inexhaustible, and environmentally palatable source of elec-

tric power. Utility planning departments acted accordingly: nuclear became the option of choice to meet baseload demand growth from the 1960s into the mid-70s, a period marked by generally rising electricity demand and, with the arrival of oil price/supply shocks in 1973-74, the first signs of dan-

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# 26th National Regulatory Conference

Mark your calendars! The 26th National Regulatory Conference will be held on May 13-14, 2008, in Williamsburg, Virginia at the Marshall Wythe School of Law. This year promises to be another exciting conference and it will begin with a keynote address from the Honorable James Kerr, North Carolina Commissioner.

The committee is working diligently to put together educational and lively panels. We anticipate panels on electric conservation, new telecommunications technology, new electric generation facilities, and climate change. What conference would be complete without an ethics jeopardy showdown?

We hope to see you there! Registration materials and more information will be mailed in March. If you have any questions, please contact Kiva Pierce at (804) 786-3809.

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## Nuclear Generation *(continued)*

ger from over-dependency on Middle-East imports.

But the mounting popularity of the nuclear option unexpectedly hit the skids beginning in the late 1970s and into the 80s, as the nearly disastrous partial core meltdown at Three Mile Island in Pennsylvania (1979) and the actual disaster at Chernobyl in the Ukraine (1986) gave the American public, and indeed much of the world, a serious case of the safety jitters.<sup>1</sup> Further headwinds for the nuclear option came in the form of greater regulatory caution, layers of redesign delays, and double-digit inflation in the economy at large, causing massive cost overruns and related financing challenges for ongoing projects. Those units under construction that weren't canceled in midstream (distributing financial pain to utility shareholders and ratepayers alike) were completed at often astonishing multiples of their initial cost estimates. Plants expected to cost no more than \$1 billion commonly morphed into three, four, or five billion dollar behemoths for the same amount of megawatts, creating traumatic rate cases in the 1980s as the constructing utilities sought full dollar recovery but met a brick wall of resistance from ratepayer advocates and commission staffs.<sup>2</sup>

Virginia ratepayers were fortunate to escape the worst of this, in part because Virginia Power's planned 1980s nuclear expansions (beyond its two Surry and two North Anna units completed between 1972 and 1980) were cancelled before the incurred costs reached unmanageable levels. But the stigma surrounding nuclear power in the U.S. by then had profound long-term implications, including pressures from the industry, ratepayer, and financing communities that contributed to the push for competitive restructuring in the mid to late 1990s. In the meanwhile, as the reactor construction industry entered its own version of a nuclear winter – over a quarter century has passed since Three Mile Island without any new plant orders in the U.S. — the excess generation capacity of the late 80s and early 90s in much of the country was gradually worked off, and the search began anew for a baseload energy source that would meet the demands of the next century. Coal remained an abundant and reasonably priced domestic fuel utilizing well-understood technology;

but it was becoming increasingly suspect environmentally and thus not easy to permit in some parts of the country.<sup>3</sup> Moreover, the introduction of “merchant” plants<sup>4</sup> to the

landscape gave new appeal to natural-gas fired generation, given its relative permitting ease, shorter lead-times, and far lower capital costs (not to mention lower air pollutant and carbon emissions compared with coal and oil). Such advantages, coupled with major technological strides, brought natural gas out of the margins as a “peaking” fuel and into the mainstream as the generating option of choice for the mid-90s and beyond — even for baseload operations. But gas's golden age was even shorter-lived than nuclear's, as wellhead prices – surprisingly tame throughout much of the 80s and 90s — took off on an Alpine ascent not long into this decade, confounding gov-

ernment predictions toward the end of the 90s that escalation would be moderate. Plenty of efficient new gas-fired units had sprung up in the meantime, but their substantially higher dispatch costs, with gas selling for two to three times the level prevailing when they were planned, weakened the claims

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<sup>1</sup> While many people think of Three Mile Island as the beginning of the end of the nuclear construction boom, planned nuclear units were already being cancelled simply because demand was not accelerating as rapidly as once expected.

<sup>2</sup> Much of these staggering costs wound up in the ratebase. A substantial portion was “eaten” by utility shareholders too, as ratepayer resistance took the form of arguments that excess capacity was not “used and useful” or that the high completion costs reflected imprudence in plant construction. Agonizing settlements and/or commission decisions splitting the baby in some fashion left a sour taste in the mouths of almost everyone – not only for nuclear plant projects but for the whole regulatory scheme generally.

<sup>3</sup> Global warming consciousness, cresting in the last couple of years, has pushed the coal industry to develop new generation technologies that remove greenhouse gases from air emissions, at a considerably higher cost. These are early in their commercial demonstration stage, so their eventual impact on generation technology choice for electric utilities is hard to predict.

<sup>4</sup> Also commonly known as “independent power plants,” these are generation facilities constructed by entities with no franchise to serve the public at retail. They have been made possible by competitive restructuring on the wholesale generation market level led by the Federal Energy Regulatory Commission (FERC) and by those states that have followed suit at the retail level, through “customer choice” programs.

# SCC Approves Limited Deregulation of Verizon's Virginia Retail Services

By Ashley Beuttel Macko

On December 14, 2007, the Virginia State Corporation Commission issued a unanimous order which may have considerable impact on the way Verizon conducts business in its Virginia service territory. While the Commission did not approve Verizon's application completely, it did agree to allow deregulation of "bundles" throughout Verizon's service territory and to allow deregulation of "basic local exchange telephone service" in certain local exchanges, subject to certain competitive safeguards required by the statute.<sup>1</sup>

The statutory standard applicable to Verizon's case is found at § 56-235.5 B-D and allows deregulation of an unspecified scope when and where this Commission finds that competition or the potential for competition exists for a telephone service or services and is or can be an effective regulatory of the price of the telephone service or services. Together with the local competition policy, set forth in 56-235.5:1, the Commission found:

*In determining whether a particular exchange was sufficiently competitive to allow deregulation, the Commission applied a "competitiveness test" to determine whether deregulation of BLETs in a telephone exchange was appropriate.*

the General Assembly has set forth a general policy that directs this Commission to favor, within the parameters of those statutes, the promotion of competition for local exchange telephone services and to recognize in our regulatory structures competition where it already exists or may soon realistically exist. In promoting competition and deregulating as competition develops, however, we find that the General Assembly has also directed the Commission to proceed carefully and cautiously.

The Commission reviewed and analyzed the major sources of statewide competition cited by Verizon. It held that competitive local exchange carriers ("CLECs"), which must rely on service and facilities leased from Verizon should not be considered "facilities-based" providers for purposes of its analysis and that CLECs did not meet the standard for "potential for competition" in the statutory standard on a statewide basis. With respect to competition from interexchange carriers for local service, the Commission found that today's AT&T or MCI (both acquired by the regional Bell Operating Companies), did not meet the "potential for competition" standard to be considered statewide competitors with

Verizon for mass market, residential wireline service.

The Commission found that cable telephony was a competitive option reasonably meeting the needs of consumers in terms of reliability and service quality. The Commission limited this finding, however, to areas where a cable company was present in the local market and currently offering telephone service. With respect to wireless telephony, the Commission acknowledged it was not a perfect substitute, and found it could not be considered a statewide substitute for Verizon's wireline services. The Commission seemed to find persuasive on this point that Verizon's own evidence demonstrated that while the overall number of wireless lines has grown, very few Virginia customers have "cut the cord" entirely and replaced their landline with a wireless service. The Commission did find that to exclude wireless completely from its analysis would understate the level of market competitiveness. Similarly, while the Commission did not find voice over internet protocol telephony ("VOIP") was a statewide competitor, the Commission did find it appropriate to include "over the top" VOIP in its market analysis when it is both available and the customer has chosen to purchase broadband internet service.

The Commission found that competition is not uniform across Verizon's territory and must be considered in smaller geographic segments. Rather than Metropolitan Statistical Areas ("MSAs") advocated by some parties, the Commission found the MSA to be too large and economically diverse to prevent Verizon from discriminating in its service offerings against customers in rural exchanges. The Commission did decline to reach down to the wire center level, but instead adopted the telephone exchange as the appropriate geographic area to be analyzed. The geographic designations of the telephone exchange areas are specifically defined in the Code of Virginia.

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<sup>1</sup>Generally, basic local exchange telephone service, referred to often as simply "BLETs" is basic dial tone service and bundles are a designated group of services offered to customers at a set price which consist of BLETs and other services.

# Natural Gas Utility Revenue Decoupling and the Impact on Conservation

By Kristian Mark Dahl

Many natural gas utilities in Virginia and elsewhere continue to experience declining residential customer gas usage levels, largely due to conservation, efficiency and other consumer-driven reactions to higher gas prices. Under traditional ratemaking, the companies' profits are tied to the amount of gas consumed by their customers. Even small changes in gas sales can have a significant effect on a gas utility's earnings. At the same time, increased environmental awareness, and concerns over global climate change and energy independence have sparked a renewed interest in conservation. Conservation has been touted as the answer to inadequate supply, higher projected natural gas prices and inadequate overall investment in infrastructure, generally through the encouragement of demand side management, energy efficiency, and customers curbing their use of natural gas.

While traditional utility ratemaking recognizes that gas utilities are allowed to recover costs plus a reasonable rate of return, a gas utility's ability to recover costs largely depends on customers' volumetric usage. Thus, all things being equal, a gas utility would seek to sell additional gas, not less. This sets up a direct conflict between customer conservation (and reduced usage) and a utility's financial stability, notably, its ability to recover its approved rate of return. One possible regulatory solution to this conflict is now being advanced in several states called "revenue decoupling" – an intentional separation of gas usage from profits. The result of a fully-implemented decoupling program is that, essentially, the utility becomes indifferent to its sales. Once indifferent to its sales, this disincentive to promoting conservation is removed. Because of this connection to conservation, revenue decoupling has been supported by various environmental groups. Advocates of decoupling advance that what is needed to resolve this misalignment of interests is to provide customers with incentives to conserve and, at the same time, provide a mechanism that allows natural gas utilities to earn their authorized return. A solution for the utility is as important as conservation to the consumer – without the former, the latter is nearly impossible. Gas utilities cannot be expected to act contrary to their shareholders' interests and yet the traditional response of filing continual rate increase applications in order to offset the lost profits resulting from reduced consumption only further contributes to the usage erosion dilem-

ma many utilities are now facing. Advocates of revenue decoupling argue it is a win-win proposition, that is, gas utilities earn their authorized rate of return while consumers pay lower total bills because of reduced commodity charges resulting from conservation.

While there are significant variations in proposed and existing decoupling programs, a basic decoupled rate structure or design is a method intended to allow utilities to actively promote energy efficiency while preventing the erosion of margins generally associated with those efforts. Addressing Piedmont Natural Gas Co.'s North Carolina pilot decoupling program, *Foster's Natural Gas Report* described (Nov. 2007) the state implementation of revenue decoupling programs as an expanding trend, now encompassing 17 utilities in 10 states and representing some 15 million residential customers.

Most decoupling programs have taken the form of a "tracker," which in its purest form is a mechanism that adjusts rates and revenues when sales deviate from their targeted level. Approved in 2005, North Carolina's pilot decoupling project, dubbed the Customer Utilization Tracker or "CUT," is one such model for decoupling now being studied. The CUT applies both to Piedmont's residential and commercial customers, posting surcharges or credits to a separate CUT

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<sup>1</sup> All citations are to the slip opinion, available at <http://supremecourt.us/opinions/06pdf/05-1126.pdf>. *Twombly* at 24.

<sup>2</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>3</sup> Dissent at 8-9; see fn 5, citing *inter alia* *NRC Management Servs. Corp. v. First Va. Bank-Southwest*, 63 Va. Cir. 68, 70 (2003) ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it.").

<sup>4</sup> Previous decisions of the Court involving a § 1 complaint had addressed the sufficiency of evidence. In these decisions the Court had concluded that that parallel conduct, without more, does not support an inference of illegal agreement sufficient to survive a motion for summary judgment or directed verdict. *Twombly* at 7, citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (2003).

<sup>5</sup> *Twombly* at 12. The complaint consisted of all subscribers of local telephone and Internet services provided by the then-remaining Regional Bell Operating Companies (BellSouth Corporation, Qwest Communications, SBC Communications, Inc. and Verizon Communications, Inc., successor-in-interest to Bell Atlantic Corporation).

# Wind Farm Approved by SCC

Case No. PUE-2005-00101 By Kiva Bland Pierce

In a case of first impression involving renewable wind energy generation, the State Corporation Commission (“SCC or Commission”) recently approved the construction and operation of a \$60 million “wind farm” in Virginia subject to certain conditions. The project is expected to include 19 windmills reaching 400 feet tall in Highland County, Virginia. On December 20, 2007, the SCC conditionally granted the request of Highland New Wind Development, LLC (“Highland Wind”) for a certificate of public convenience and necessity to build, own, and operate a wind energy generating facility. The approval was granted pursuant to Virginia Code Sections 56-46.1 and 56-580 D, which required the Commission to authorize the facility if it would have no adverse material impact on the reliability of electric service and was not otherwise contrary to the public interest. The Commission was also required to consider the effect of the facility on the environment. The Commission further noted in its Final Order that it had considered the policies enunciated in the Virginia Energy Plan.

The conditions imposed by the SCC were directed at the environmental impact of the line. They include requiring Highland Wind to comply with the monitoring and mitigation plan for bats and birds, acquire all the necessary environmental permits, and meet the additional conditions set forth by the Department of Environmental Quality. The certificate granted by the Commission will expire in two years if construction of the facility has not been initiated, but gives Highland Wind the option of filing for an extension for good cause shown.

The Commission limited the costs that Highland Wind would be required to spend in furtherance of the Commission-ordered monitoring program to \$150,000 per year for the first three years and then the higher of \$100,000 or 1.75% of the prior year’s gross revenues associated with the wind farm. The mitigation (as opposed to *monitoring*) cost cap, in contrast, was established as the higher of \$50,000 or 0.85% of the prior year’s gross revenues. The majority opinion found that the cost caps could be too high or too low for the mitigation necessary and thus held that either Highland Wind or the Department of Game and Inland Fisheries (“DGIF”) could file a future petition for modifications to the mitigation cost cap after three years of actual monitoring.

Commissioner Jagdmann dissented in part. Specifically, she disagreed with the majority’s decision to allow Highland

Wind and/or DGIF to file a petition for modifications of the mitigation cost cap, which could result in raising, lowering or reallocating funds among mitigation and monitoring. Commissioner Jagdmann explained that this portion of the Final Order does not create a definitive ruling on the certificate requirements and could result in “untenable financial uncertainty” for Highland Wind and future applicants seeking to construct new generating facilities.

Now that Highland Wind has the authority, albeit conditional, to construct a wind farm, we must wait and see if it will go through with the project.

About the Author: Kiva Bland Pierce is an Assistant Attorney General in the Insurance and Utilities Regulatory Section. After receiving her J.D. from the University of Richmond, T.C. Williams School of Law in 2001, she clerked at Henrico Circuit Court. Her undergraduate degree comes from Louisiana State University, whose football team just won the National Championship - Geaux Tigers!

## Electric Service Territory Transfer on the Eastern Shore

On October 19, 2007, the State Corporation Commission approved the transfer of Delmarva Power & Light Company’s Virginia service territory and electric distribution facilities to A & N Electric Cooperative. The combined service territory spans the Virginia portion of the Delmarva Peninsula and includes more than 33,000 customers.

After finalization of the transfer in early January 2008, Delmarva moved to voluntarily withdraw two appeals by which the Company sought to overturn Commission orders entered in a recent fuel rate proceeding. The United States Circuit Court of Appeals for the Fourth Circuit has granted withdrawal of the appeal lodged with it and Delmarva’s motion is currently pending before the Supreme Court of Virginia.

# Developments on the State and Federal Levels Related to Climate Change and Associated Energy Issues

By Susan M. Hafeli

*Climate change and energy issues have grabbed the attention of lawmakers and regulators as the scientific basis for global warming, national security concerns, and increasing public concern compel action. The following highlights selected recent activity at the federal and state levels.*

On December 6, 2007, the U.S. Senate Environment and Public Works Committee approved a landmark climate-change bill on an 11-8 vote. America's Climate Security Act of 2007 (S. 2191), co-sponsored by Senators John Warner (R-VA) and Joseph Lieberman (I-CT), seeks to substantially reduce U.S. greenhouse gas (GHG) emissions by 2050 without sacrificing the health of the economy. The measure would cap GHG emissions in specific economic sectors at 2005 levels by 2012, and then lower the cap each year between 2012 and 2050. By 2050, GHG emissions in these sectors would be 70 percent below 2005 levels. To achieve these reductions, the Act would establish a mandatory cap-and-trade program applicable to certain "covered facilities," including electric power plants. Although the bill is a bipartisan effort that many believe already compromises on key issues, it faces vigorous opposition and the threat of a Senate filibuster, as well as a likely Presidential veto should it pass.

Threats of a Senate filibuster and Presidential veto led to significant changes in the Energy Independence and Security Act of 2007 (H.R. 6) in December. The version approved by the U.S. House of Representatives on December 6, 2007 would have established a federal renewable electricity standard (RES) and provided tax incentives for the renewable energy industry. Due to fierce Senate opposition, the RES and tax incentive provisions were omitted in the revised version of the Act approved by the Senate on December 13, 2007. The House concurred in these Senate amendments on December 18<sup>th</sup> and President Bush signed the bill into law the next day, on December 19, 2007.

The Virginia General Assembly rejected a mandatory RES in its 2007 session. Instead, as part of the hybrid "re-regulation" bills, identical H.B. 3068 and S.B. 1416 (Chapters 888 and 933 of the 2007 Acts of Assembly), the General Assembly established voluntary renewable portfolio standard (RPS) goals and related financial incentives.

Pursuant to Sec. 56-585.2, an electric utility that shows a reasonable expectation of achieving 12 percent of base-year electric energy sales from renewable energy sources by 2022 earns an incentive that increases its established rate of return. Dominion Virginia Power (Dominion) has announced its intention to meet the goals and on November 29, 2007 issued a Request for Proposals for projects in development or early construction that will generate energy using wind, sunlight, falling water, sustainable biomass, waste, wave motion, tides, or geothermal energy. On December 3, 2007, the State Corporation Commission (SCC) initiated Case No. PUE-2007-00107 to promulgate rules and regulations to implement the RPS provision.

Also as part of the re-regulation legislation, the General Assembly announced a stated goal of reducing, by 2022, retail customers' consumption of electric energy by an amount equal to 10 percent of the amount of 2006 retail electric-energy consumption. Pursuant to a legislative directive, on June 8, 2007 the SCC initiated Case No. PUE-2007-00049 to determine a recommended mix of programs to cost-effectively achieve the goal, and to address other specified issues. SCC staff released its report on November 16, 2007, concluding that the goal was achievable but noting the need to address certain threshold issues. The SCC transmitted the staff report to the Governor and General Assembly on December 14, 2007. Consistent with the staff report, it recommended that the General Assembly consider legislation to (1) define a guideline or mechanism for declaring whether a specific conservation plan is "cost-effective" and (2) require the major electric utilities to develop and file with the SCC certain data on marginal and avoided costs.

In its report, SCC staff referred to and relied upon many of the recommendations made in the Virginia Energy Plan, released September 12, 2007 by the Department of Mines, Minerals and Energy and developed in consultation with the State Corporation Commission, Department of Environmental Quality, and Virginia Center for Coal and Energy Research. The Energy Plan finds that Virginia has the potential to cost-effectively achieve a 14 percent reduction in

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## Transmission Line Applications *(continued)*

those factors is that, although transmission assets are still owned by the local incumbent electric providers, the transmission grid is now being managed by an independent system operator; in Dominion's case, the PJM Interconnection. In addition, federal legislation has resulted in a mechanism for the creation of National Interest Electric Transmission Corridors, as well as in the prospect that siting authority in particular cases may be taken away from the Virginia Commission and given to regulators in Washington if the SCC does not act quickly enough to approve applications for power line certificates.

At the same time, the public has become both more concerned and better informed about environmental problems – global warming in particular – such that debate over the ecological impacts of a proposed power line is no longer focused on the local flora and fauna. Instead, public witnesses are asking whether a transmission line is really intended to import coal-by-wire from the Midwest, and wondering about what that would do to their carbon footprint. In addition, growth in Northern Virginia has resulted in applications for new facilities in proximity to numerous areas and properties of historical significance. Consequently, public witnesses and respondents are now urging the Commission not to allow transmission towers to be erected on what they consider to be hallowed ground.

All of this means that the certification process for an electric transmission line is no longer principally a matter of local concern. Instead, the process is now taking regional, national and even global implications into account. Another northern Virginia transmission project, significantly larger in size than the 230 kV lines in Loudoun and Stafford Counties, will soon go to hearing. When the Commission considers the application of Dominion and TrAILCo for their proposed Meadow Brook-Loudoun 500 kV line (SCC Case No. PUE-2007-00031) and TrAILCo's associated application to extend that project to the Virginia-West Virginia boundary (SCC Case No. PUE-2007-00033), it will be looking at many of the same-old issues in a new and significantly more expansive light. In fact, the Commission asked the parties in that case to address the scope of its authority to consider regional impacts that reach beyond Virginia's borders, and has ruled that it does have authority to consider regional, multi-state

need for a transmission line.

So, what will the old familiar transmission line issues look like in our brave new world?

*There are, however, factors at play that are putting those issues in a new light, and that may result in rulings that are surprising – or that would have been surprising even a short time ago.*

Need: Until now, need has almost been a given in transmission line cases. Especially after the wholesale market for power was deregulated (which occurred much more effectively than deregulation of the retail market), constraints in the grid that inhibited bulk transfers to competitive markets became apparent. In addition, alternatives to transmission reinforcement proved difficult to implement. New generation projects posed their own siting and certification problems, and energy conservation and load management programs were never trusted to make enough of a real difference in

actual load and usage levels. Moreover, it has always been very difficult to challenge a power company's assertion of a need for transmission reinforcement. If the power ever really does go out, no one wants the finger of blame pointed at them.

While challenging the need for a transmission line will still be difficult, at least some of the alternatives are starting to look more viable. This is principally the result of the global environmental situation. Energy conservation is quickly becoming a priority for rank and file customers, and the folks in charge – ranging from state legislators and regulators to world leaders – are all setting ambitious goals for reducing consumption levels. There is no doubt that we are all going to have to get serious about energy efficiency. In addition, the need to decrease reliance on old environmentally unfriendly power plants is making the prospect of local green generation more attractive, and such options will receive further encouragement as mandatory renewable portfolio standards are implemented. In this context, the need for a new power line is, at least, a more complex issue than it has been in the past.

The Commission Staff typically has not utilized outside resources for examining the need for new transmission lines. However, the Meadow Brook-Loudoun line case represents a significant exception to this typical approach. In that case, the Staff hired a consultant who looked extensively at the need for the line and ultimately suggested that even more study regarding need might be advisable.

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## Transmission Line Applications *(continued)*

Routing: While regional, national and global issues will be requiring more attention than in the past, the essentially local issue of routing a transmission line will surely continue to produce the most heated opposition in certification proceedings. No one wants a power line in their back yard. This situation is aggravated by the fact that, to the extent that the grid actually does need to be reinforced to serve local loads, as opposed to distant markets, the areas where the load had grown most dramatically are, not surprisingly, areas that have become crowded with residential communities and high-end commercial developments. There simply are not many places to route a line that would not create adverse impacts that are significant in both their number and their nature. The situation in northern Virginia, in particular, is further complicated by the fact that those dwindling areas that have not experienced rapid and dense development are often the areas where Civil War battlefields and other historic districts and properties are found, or where critical parks and recreation areas are located.

The solution to the routing conundrum will require creativity, both in selecting routes and in providing effective mitigation to reduce the impacts of any new power line. (More below on mitigation.) In its most recent applications, Dominion has relied heavily on the technique of routing new lines on existing rights-of-way ("ROW"). In fact, the preferred route proposed for the Meadow Brook-Loudoun line was developed precisely so that it could utilize existing ROW, and it has been endorsed by the Commission Staff as well as the Company, even though it is longer than an alternative route along I-66. Use of existing ROW, however, is not a panacea, and the mere fact that a ROW exists does not mean that routing along it will be sufficient to reasonably minimize adverse impacts, as required by Va. Code § 56-46.1. In Stafford County, for example, the route proposed for the Garrisonville line contains an existing ROW, but the ROW was obtained in the 1960s for a power plant that was never built, and has, for the most part, remained forested and unused, except where it adjoins County schools and provides fields for sports and recreation. In the Pleasant View-

Hamilton proceeding, opponents of the Dominion proposed route, as well as Staff, repeatedly relied on the use of existing ROW as a basis for putting all or portions of the route in a highly linear park even though such placement would result in large steel structures immediately adjacent to a recreational trail. Whether a route using existing ROW is the best route available is a question that will need to be addressed on a case-by-case basis. Another question is whether there isn't something more that will need to be done to reasonably minimize impacts.

Again, in a departure from recent practice, the Commission Staff hired an outside consultant to exhaustively examine routing issues in the Meadow Brook-Loudoun case. In the past, Staff had hired consultants to examine routing issues in larger cases such as AEP's Wyoming-Cloverdale (PUE-1991-00050) and Wyoming-Jacksons Ferry (PUE-1997-00766) cases involving 765 kV transmission lines. In smaller cases, Staff did not hire an outside consultant

and remained outside the fray, taking no position on routing issues. This traditional approach was not adopted in more recent smaller cases, however, where the Staff report did address routing notwithstanding the absence of guidance from an expert consultant. This had led to a more simplistic approach to routing by Staff, such as using the shortest, straightest line as the benchmark for judging other routes without adequate consideration of other factors that impact routing.

Undergrounding: One obvious way to significantly reduce the visual impact of a transmission line would be to put it underground instead of stringing it overhead on transmission towers. In fact, this solution has been proposed repeatedly by respondents in past transmission line cases. To date, however, no power company has been required by the SCC to construct a transmission line underground that the company wanted to construct overhead. The two principal arguments made against undergrounding are (1) that underground transmission lines are less reliable than overhead, and (2) that the

*Energy conservation is quickly becoming a priority for rank and file customers, and the folks in charge – ranging from state legislators and regulators to world leaders – are all setting ambitious goals for reducing consumption levels. There is no doubt that we are all going to have to get serious about energy efficiency.*

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## Transmission Line Applications *(continued)*

costs of undergrounding greatly exceed the costs of an overhead line. On both of these points, however, there are important new developments. Until recently, Dominion had insisted that any underground transmission line on its system use high-pressure fluid-filled pipe (HPFF) technology, rather than the more simple XLPE technology, which consists of insulated cables in duct banks. An XLPE underground line is more reliable and less expensive than an HPFF line (although still considerably more expensive than an overhead line). In the Garrisonville 230 kV line case, however, after initially proposing an overhead line, Dominion filed a supplement to its Application in order to put forward an XLPE underground alternative for the Commission's consideration. The Hearing Examiner in that case has now recommended building the line underground on an experimental basis to permit Dominion to gain experience with the XLPE technology so that it might be considered in appropriate cases in the future. In the Pleasant View-Hamilton case, the Commission remanded the case for a more detailed consideration of, among other issues, underground routing options. Whether technology exists, or will be developed in the near future, to reasonably permit the placement underground of transmission lines greater in size than 230 kV remains to be seen.

**Health Effects:** This is one persistent issue on which there are no significant developments to report. In fact, the debate over whether the electric and magnetic fields ("EMFs") generated by power lines can cause cancer or other diseases was more heated during the 1990s, when AEP's Wyoming-Cloverdale and Wyoming-Jacksons Ferry cases were tried. Neither the evidence submitted in those cases, nor studies authorized by the General Assembly during the same period, established any conclusive link between power lines and disease. The Commission has never ruled that any plans for a proposed power line needed to be rejected or even modified due to the risk of adverse impacts on human health.

Since that time, additional medical studies and reports have issued on both sides of the EMF debate. However, while

there seems to be legitimate grounds for disagreement, there has been no indication that the SCC will be re-examining the matter. This is not to say that public perception of health risks

attendant to power lines is insignificant or that it will not be given serious consideration by the Commission. Whether or not power lines actually do cause cancer, widespread fear that they might has fueled opposition to the routing of lines through residential communities and particularly near schools and recreation areas where children will be present, and the Commission will certainly continue to address those concerns.

**Property Values:** Another issue that has always been hotly debated in transmission line cases is the impact of overhead lines on the value of neighboring residential properties. It would appear to be "self-evident" that the prevailing public sentiment – that most people would rather relocate than live next to a power line – necessarily impacts property values, as the Hearing Examiner noted in his Report on the Garrisonville line. He also noted that a significant reduction in property values will translate to a loss in

tax revenues, which will directly affect economic development. Nonetheless, the dueling experts in these cases continue to disagree about whether such impacts are devastating or merely illusory. In order to determine what the extent of the impact really is, the Hearing Examiner in that case has recommended that the Commission should undertake its own study of the effect of an overhead line on real estate values.

**Mitigation Measures:** As noted above, both the power companies and the Commission are going to need to get creative, both in route selection and in employing mitigation measures, if adverse impacts of new transmission lines are going to be honestly and effectively minimized. Such mitigation will need to include general measures such as using least impacting tower structures (e.g., tubular steel poles instead of steel lattice towers) and employing ROW design standards such as those set out in guidelines issued by the Federal Energy Regulatory Commission (e.g., cross roadways at angles to

*The solution to the routing conundrum will require creativity, both in selecting routes and in providing effective mitigation to reduce the impacts of any new power line.*

*Whether a route using existing ROW is the best route available is a question that will need to be addressed on a case-by-case basis.*

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## Transmission Line Applications *(continued)*

avoid long tunnel views). Effective mitigation will also require site specific accommodation at particular tower locations in order to avoid unnecessary impacts on particular properties (e.g., shifting a line to one side to avoid a baseball field). Perhaps the most significant step forward that the Commission has taken recently, however, is requiring the implementation of ROW Clearing and Maintenance Plans, to minimize clearing in the ROW so that the maximum amount of vegetation can be retained. Such a plan is being recommended by the Hearing Examiner, and has been agreed to by Dominion, in the Garrisonville line case. In fact, all of the mitigation measures referred to above have been recommended. In order to ensure that the adverse impacts of power lines are effectively mitigated in future cases, however, what the Commission really needs to do is develop a standard set of best practices that will generally apply.

From an overall perspective, and in order to address all of the issues surrounding new transmission line applications properly, it is essential that power companies asking for certificates to build these lines accept their responsibilities as public stewards, and develop proposals that actually attempt to minimize adverse impacts on the affected communities and on the environment. It may be difficult to balance these responsibilities with the responsibilities they have as public companies to maximize profits for their shareholders, but as public service companies, they owe the Commonwealth nothing less. Moreover, the Commission can help. Establishing a standard set of best practices for mitigations measures, as well as ROW clearing and maintenance, would help to remove those issues from the arena of litigation, where there is a strong incentive for applicants to posture and then compromise. This can best be accomplished through a general rulemaking proceeding. An

accepted set of standards would provide an improved new context in which the familiar old issues attendant to power lines can be addressed.

In summary, transmission line applications are now being considered in a brave new world, with the complexities of regional oversight (via PJM) and federal oversight (via DOE and FERC) impacting need and routing within Virginia. The Commission Staff should be commended for, in the most recent transmission line case, devoting extensive outside resources to examining these critical issues. The Commission and its Hearing Examiners have also indicated a willingness to move beyond business as usual and take a hard look at undergrounding options. This additional rigor should also be extended to initiating a rulemaking proceeding to establish best practices for transmission line mitigation measures.

Editor's Note: The Commission issued a Final Order in Case No. PUE-2005-00018 on February 15, 2008. The Commission reaffirmed its finding of need for the line and adopted the Hearing Examiner's recommended route. Significantly, the Commission adopted the Hearing Examiner's recommendation against underground construction due to the physical impacts and cost to ratepayers.

*The Hearing Examiner in that case has now recommended building the line underground on an experimental basis to permit Dominion to gain experience with the XLPE technology so that it might be considered in appropriate cases in the future.*

*Establishing a standard set of best practices for mitigations measures, as well as ROW clearing and maintenance, would help to remove those issues from the arena of litigation, where there is a strong incentive for applicants to posture and then compromise.*

About the Authors: Mr. Quinan and Ms. Robb are partners at Christian & Barton, L.L.P. in Richmond. They have represented a variety of respondents in recent transmission line cases at the State Corporation Commission, including property developers, homeowners associations, a municipality and a governmental authority. Comments in the accompanying article do not necessarily represent the positions of their clients.

## Nuclear Generation *(continued)*

of this technology to serve as our baseload power foundation for the future.<sup>5</sup>

### *Nuclear Energy Emerges from the Cellar*

This reshuffling of cost and environmental priorities has thrown the search for baseload options wide open again. The popular new “renewables” – wind, solar, geothermal, biomass, *etc.*, — along with demand management appear destined to fill an important niche, but few argue they alone can solve our future baseload needs, as demand again surges and many aging fossil fuel plants face retirement. While hydroelectric capacity is generally long-lived, low-cost, and does not contribute to air pollution, its expansion potential is limited (and environmental groups, as a rule, oppose dams). With these constraints, the pendulum has begun to swing back towards a seeming castoff, and there is much talk of a “nuclear renaissance.” There are some salient reasons. Despite the long drought in orders for new nuclear plants, the science and engineering curves have not plateaued, and we’ve learned how to operate the existing U.S. fleet of over 100 units with improved safety and efficiency.<sup>6</sup> We’ve also found ways to “stretch” many of these plants through capacity “upratings” and license extensions to defer their impending retirements. Now, with ever-increasing pressure to minimize carbon emissions from fossil fuels, coupled with the economic dilemma of soaring natural gas prices, new nuclear reactors may at last be on the long-term horizon.

Plenty of policy initiatives are also improving traction for a nuclear comeback. These include (1) a reconceived NRC licensing process — namely, a *combined* construction and operating license, or “COL” — designed to pave over the twin potholes of mandatory construction redesign and crippling delay (along with commercial operating uncertainty) that plagued the industry from the late 70s throughout the 80s;<sup>7</sup> and (2) Congress’s enactment, as part of the Energy Policy Act of 2005 (EPAAct 2005), of multiple incentives to jumpstart the nuclear option and encourage commercialization of the “advanced” reactor designs now on the market. Among the available Federal catalysts are (a) DOE sharing of the developer’s NRC application costs; (b) partial loan guar-

antees; (c) production tax credits; and (d) an insurance fund to protect operators against the costs of future government-imposed delays. These incentives are not necessarily open-ended, so there are advantages to getting an early place in the queue.

This critical mass of technology improvement, policy innovation, and economic necessity has led, in the second half of 2007, to the filing at the NRC of four complete COL applications to construct new nuclear units in the U.S. — in most cases at sites with suspended or already constructed projects. In Virginia, we have seen Dominion make such a filing in December to add a new 1520 MW reactor at its present North Anna site.<sup>8</sup> Nationally, COL applications have been filed by NRG (for its South Texas Project site), TVA (for its Bellefonte site), and Duke at a “greenfield” site in Cherokee County, S.C. In addition,

Constellation has filed a partially completed COL to build another unit at its existing Calvert Cliffs, Md., site, and several dozen other utilities have declared they are considering the nuclear “option.” All this activity plainly marks the debut of a *potential* new nuclear age.

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<sup>5</sup> Moreover, natural gas — unlike nuclear and coal — is prized for space heating of homes and commercial establishments and is a widely used industrial input. With domestic supplies limited, we are looking at increasing dependence on imported LNG for incremental growth in natural gas usage. And some of the largest LNG exporters happen to be the less stable or less pro-Western states, raising the risks of cartels or the use of energy as a political weapon.

<sup>6</sup> Technical improvements, including longer cycles between fuel assembly replacements, have resulted in significantly higher capacity factors, currently in the 90% vicinity, up from the 70-80% range prevalent until the 1990s.

<sup>7</sup> This has the potential to deliver nuclear developers from the ultimate financial nightmare suffered by LILCO’s Long Island-sited Shoreham nuclear plant in the late 1980s, where years of delays in receiving an operating license for a completely constructed facility nearly bankrupted the company. The upshot was a notably costly and wasteful bargain: the company traded the operating license to an antagonistic state in exchange for rate relief to save itself. The state proceeded to surrender the license and destroy the nuclear facilities at the Shoreham site.

<sup>8</sup> In addition to the previously mentioned Federal incentives, a Virginia-based nuclear expansion would be eligible for an enhanced rate-of-return incentive established by the 2007 General Assembly’s “re-regulation” law. See Va. Code § 56-585.1A.6

## Nuclear Generation *(continued)*

### *Are We There Yet?*

Despite this heady news of renewed commercial nuclear interest and “advanced” reactor designs, there are more than a few caveats to underscore. First, there is the lead-time. The NRC review process alone is expected to take three to four years to complete, and the construction period for the “advanced” nuclear designs, while claimed to be shorter than in the ill-fated projects of the late 70s and 80s, still would take at least another four to five years, assuming all goes well. The most optimistic projections thus foresee plants going on-line in the middle of the next decade. Given the long time from conception to commercial operation, many of the new facility proposals are self-described efforts to “keep all options open” while the merits of new nuclear facilities versus other alternatives are sorted out. The stringency of new carbon emission regulations, for example, or the still-evolving economics of carbon sequestration could tip company decisions for or against proceeding with a nuclear option.

There is no mistaking the enthusiasm to forge ahead on the part of the reactor industry and utilities already operating and dependent on nuclear investments. Indeed, the NRC has been put on notice by electric utilities (including some new players) to expect 21 applications over the 2007-2009 period to construct 32 new units.<sup>9</sup> Moreover, the rallying cries from Bush Administration officials and legislators who supported the incentive provisions of EPAct 2005 contribute to a chorus that nuclear is back — and just in the nick of time. However, many of the old problems that suppressed nuclear growth in the 1980s have not been completely exorcised, and a few new ones lurk.

These include, for starters:

- Remaining political and environmentalist resistance<sup>10</sup> to nuclear expansion, particularly in certain parts of the country (*e.g.*, the West Coast and Northeast);
- Financing the enormous capital cost of new construction (even with cutting-edge designs and intentions to “standardize,” building nuclear units appears

to have the highest per-kW cost of all generation options);

*Given the long time from conception to commercial operation, many of the new facility proposals are self-described efforts to “keep all options open” while the merits of new nuclear facilities versus other alternatives are sorted out.*

- Dealing with remaining regulatory uncertainty and construction risk.<sup>11</sup>
- Long-term safe storage of nuclear fuel wastes (the legislated repository deep in Yucca Mountain, Nevada — is still elusive and fraught with political controversy);
- Risk of terrorism attacks at old or new plants (including the post-9/11 specter of airplanes deliberately crashing into nuclear plants or the pirating of spent nuclear fuel to create “dirty bombs”).

These and other blinking yellow lights have, of late, provoked a steady flow of studies and articles throwing a few dashes of skepticism on the premise that we are on the brink of a new nuclear era. The kinds of issues being raised are certain to furrow the brows of utility planners, regulatory commissions, and intervenors alike. Besides those touched on in the bullets above, analysts have pointed to (1) increasing price volatility in the uranium fuel cycle;<sup>12</sup> and (2) a pervasive “chicken and egg” problem, where (a) the chain of suppliers of fuel, equipment, and skilled labor has dwindled considerably since the last nuclear construction boom; (b) potential suppliers are reluc-

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<sup>9</sup> The NRC has so far received five actual applications — four full and one partial. These applications are non-binding, and it is speculative, of course, how many units might actually be built.

<sup>10</sup> To be sure, some environmentalists have softened their opposition to nuclear, given their even greater concerns about global warming, but this feeling is far from universal at present.

<sup>11</sup> For starters, there is a concern that the NRC itself lacks the resources to study and process the avalanche of nuclear reactor applications lately heading its way. Moreover, as noted below, a major increase in orders for reactors and related equipment is apt to cause severe growing pains for a shrunken industry.

<sup>12</sup> While nuclear generation is more able to absorb fuel costs increases than fossil fuel plants because nuclear process economics are more capital than fuel intensive, the outsized spot market price spikes lately seen in the complex, multi-stage uranium fuel cycle begin to materially affect comparative project economics. See Edward D. Kee, “Nuclear Fuel: A New Market Dynamic,” *Electricity Journal*, (Dec. 2007).

## Nuclear Generation *(continued)*

tant to invest in enlarging capacity without the certainty of orders; and (c) project developers will be reluctant to place binding orders with so many weak links in the supply chain.<sup>13</sup>

In addition, the abandonment of the traditional regulated monopoly market structure in many states creates its own set of pluses and minuses when it comes to the nuclear option. While it would, in theory, obviously benefit ratepayers for developers to shoulder all the pre-operational costs and the risk of overruns and delay, it seems fair to ask how many “merchant” utilities — without secure franchises to serve retail ratepayers — can afford to embark on such a long-term construction venture, and what financing they can attract.<sup>14</sup> And even in fully regulated environments, there will be pressure on all concerned not to repeat the debacles of the 1980s. Utility negotiating nimbleness with multi-national vendors anxious to reignite the reactor industry could help address these daunting concerns. Moreover, the absence of clearly superior baseload generation alternatives will likely remain a driving force. But the only safe prediction is that a lot of drama remains to be played out before the nuclear option is back in full swing.



<sup>13</sup> See Jim Harding, “Economics of Nuclear Power and Proliferation Risks in a Carbon-Constrained World,” *Electricity Journal* (Dec. 2007).

<sup>14</sup> Moreover, the announcement of plans to construct a large nuclear unit by a dominant “merchant” generator, with high construction but low operating costs, could keep other, shorter term projects envisioned by competitors from being realized. Then, if the large nuclear unit isn’t constructed or is substantially delayed, a capacity shortage in the area could be exacerbated.

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## RULES UPDATE

At the National Regulatory Conference planning meeting held January 16, 2007, Ken Schrad, Director of the Commission’s Division of Information Resources, briefly discussed the January 15, 2008 Order of the State Corporation Commission which revised the SCC’s Rules of Practice and Procedure on electronic filings by expanding the pilot system that has been in place for the past few years. Ken Schrad noted that the new system:

- is effective 2/15/08;
- requires submission of a new authorization form (the electronic authorization form for the pilot won’t suffice);
- allows users to update their authorization info online (the pilot required the SCC to do this);
- permits filings of up to 100 pages (compared to the pilot’s limit of 20 pages);
- permits filings up to 5 p.m. (rather than 4 p.m. under the pilot);
- confirms to the SCC and to the filer the time of receipt: if something is received by the SCC database system at 4:59 pm, then that’s when the SCC time stamps it and the confirmation you’ll get back from the SCC will say that, too. If filed on a weekend or holiday, it will be deemed filed the next business day;
- requires submissions to be in .pdf format in a single file; and
- also modified filing and service Rule 140 to permit electronic service on all parties and Commission Staff in cases where all the parties and Staff have agree to such service or where the Commission has provided for same by order.

A copy of the submission form and the Commission entire order is available through the Commission’s Docket Search website under Case No. CLK-2007-00005.

## Verizon's Virginia Retail Services *(continued)*

In determining whether a particular exchange was sufficiently competitive to allow deregulation, the Commission applied a "competitiveness test" to determine whether deregulation of BLETs in a telephone exchange was appropriate: (a) 75% of households can choose residential telephone service from at least 2 competitors (a cable company, CLEC or any wireless provider not affiliated with Verizon and a VOIP competitor if 75% of the households in the exchange have chosen to purchase broadband internet service); (b) 2 of the competitors identified in (a) must offer residential local telephone service that may be purchased without a corresponding requirement to purchase none telecommunications services (video and broadband) and (c) 50% of the households in the exchange can choose a facilities-based competitor that owns its own wireline network facilities (CLECs, wireless and broad-band based VOIP providers are not included as facilities-based for purposes of the order). The Commission noted that its market competitiveness test "will ensure that *each* local exchange area will have at least one facilities-based competitive option to Verizon, which could not be guaranteed in every exchange if we used only MSAs as the geographic market area."

Applying the test, the Commission deregulated BLETs with respect to specific exchanges throughout the state (62% of Verizon's residential lines), but did so without any finding that other exchanges were not competitive, thus leaving Verizon the ability to establish the competitiveness of additional exchanges. To make such a showing, the Commission established an administrative process for Verizon to request additional deregulation without necessity of a formal petition. The Commission also applied a similar competitive test to the business market and deregulated 57% of business lines. The Commission noted that if it found that an exchange area previously declared competitive no longer meets the test, the service would go back to being regulated under Verizon's Alternative Regulatory Plan.

As required by the statutory language, the Commission found that competition, or the potential for competition, was sufficient throughout Verizon's service territory in Virginia to allow deregulation of bundled services. The Commission noted that Verizon faces competition from other providers, as well as pricing constraints from Verizon's own BLETs offerings. With respect to "big business" or enterprise segment of the market, the Commission determined it to be sufficiently competitive to allow deregulation throughout Verizon's service territory.

As a safeguard, the Commission required Verizon, as the Company had proposed, to limit residential BLETs increases to \$1.00 per year (\$3.00 per year for businesses) for five years and required Verizon to file annual reports demonstrating that rev-

enues from competitive services in the aggregate cover its direct incremental costs for those services. The Commission further found that it would initiate a proceeding by March 1, 2012 to review the status of telecommunications market in Virginia and to review any technological changes taking place in the interim. The Commission found that the service quality rules will continue to apply to Verizon and that Verizon will still be subject to the Commission's broad authority to enforce Verizon's basic statutory duties in the event that market forces fail to provide sufficient protection. While Verizon had requested it be allowed to detariff all deregulated services, the Commission declined to allow any specific detariffing.

Verizon filed a Petition for Reconsideration on December 28, 2008 which requested certain additional providers be considered facilities-based for purposes of the competitiveness test. Specifically, Verizon requested cable providers who had upgraded their networks to provide digital broadband service but not voice, UNE-Loop CLECs and wireless providers to be considered facilities-based for purposes of the competitiveness test. In addition, Verizon requested reconsideration of the requirement that broadband subscribership reach 75% in a local exchange area before VOIP is considered a competitor for purposes of the competitiveness test.

On February 1, the Commission issued an Order on Reconsideration which provided for certain modifications to the Final Order. The Commission modified its competitiveness test to include UNE-Loop CLECs as facilities-based competitors, but did not change its original determinations with respect to cable providers who were not providing voice service or wireless providers. The Commission further modified its holding, for purposes of the residential competitiveness test, to allow over-the-top VOIP to be considered a non-facilities based competitor in any local exchange in which broadband is available to 75% of households, provided that FCC data showed that statewide subscribership to broadband had reached a 75% threshold level. For business BLETs, the Commission found that statewide subscribership had risen to level that justified allowing Verizon to apply a 75% availability test to a local exchange to determine whether VOIP was a non-facilities based competitor with Verizon.

The Final Order and Order on Reconsideration is available on the Commission's docket search website under SCC Case No. PUC-2007-00008.

About the Author: See "About the Editor" on Page 1 of the Newsletter.

# Anthem Allowed to Provide Certain Services Outside of Virginia

By Kiva Bland Pierce

In approving the merger of Anthem, Inc. and Trigon Healthcare, Inc. ("Anthem") in 2002, the State Corporation Commission ("Commission") ordered Anthem to provide twelve categories of services to Virginia customers and providers from offices located within the Commonwealth.<sup>1</sup> Those twelve categories were customer service, actuarial, underwriting, marketing, quality management, claims processing and case management, community relations, distribution management, sales, provider service, medical management, and network development. Five years later, in April 2007, Anthem filed a petition seeking the removal of this condition to allow it provide these services from offices outside of Virginia.

The Commission convened a hearing on July 10 and appearances were entered by the Medical Society of Virginia and the Virginia Dental Association (collectively), the Division of Consumer Counsel of the Office of the Attorney General, and the Commission Staff. On August 9, the Commission granted Anthem's petition in part and denied it in part.

The Commission held that certain services must continue to be provided from within Virginia in order to "protect the interests of the policyholders of the insurer and the public."<sup>2</sup> The services selected by the Commission to remain in Virginia involved "daily and direct communication between Anthem and its enrolled customers or health-care providers in Virginia."<sup>3</sup> These six services were claims processing and case management, customer service, quality management, provider services, medical management, and network development.

The remaining services, actuarial, underwriting, marketing, community relations, distribution management, and sales, would be allowed to be performed outside of Virginia.

The Commission also explained that Anthem would be allowed to file future petitions to remove the remaining conditions. Since then, Anthem has filed two such petitions. The petitions respectively sought authority to provide services in Georgia for one specific account<sup>4</sup> and provide case management and utilization review services relating to organ and stem cell transplants from within any other state.<sup>5</sup> The Commission has since granted both petitions.<sup>6</sup>

*The Commission held that certain services must continue to be provided from within Virginia in order to "protect the interests of the policyholders of the insurer and the public."*

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<sup>1</sup> *Application of Anthem, Inc. and Trigon Healthcare, Inc.*, Final Order, Case No. INS-2002-00131, 2002 SCC Ann. Rept. 118 (July 19, 2002).

<sup>2</sup> Final Order, Case No. INS-2007-00141 at 6.

<sup>3</sup> *Id.*

<sup>4</sup> Case No. INS-2007-00269.

<sup>5</sup> Case No. INS-2007-00328.

<sup>6</sup> Final Order (Sept. 17, 2007); Final Order (Dec. 27, 2007).

## Web Site News

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

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

## Natural Gas Utility Revenue Decoupling *(continued)*

account pegged to a baseline level of gas usage determined as part of a rate case. Leaving aside the detailed mechanics of the CUT tariff, the general concept is that if customers use more gas than the baseline, there is a credit to customers (and a reduction in the CUT account), and when customers use less gas there is a surcharge to customers (increasing the CUT account) with Piedmont entitled to adjust rates twice a year based on the balance in that separate CUT account. In the end, the utility should be allowed to recover its approved revenues regardless of the amount of gas actually consumed. To date, there have been more surcharges than credits.

CUT has not been without its critics. The North Carolina Attorney General opposed the pilot from the start, even going so far as to challenge the program in court. Based on the surplus in the CUT account, the AG is suggesting Piedmont may receive a considerable windfall while also being critical of Piedmont’s overall progress on conservation and efficiency. North Carolina Assistant Attorney General Margaret Force has declared that “Conservation programs would have been much more cheaply funded through a simple charge on bills.” Piedmont responded by pointing to total customer savings from conservation that it calculates at \$81 million. Piedmont also believes that the AG’s criticism ignores the larger policy issue that decoupling was intended to address: unlike volumetric rate design, decoupling removes the utility’s incentive to encourage increased energy consumption and can help align the interests of a gas utility and its customers around conservation and energy efficiency.

The National Regulatory Research Institute has characterized the general mood among state commissions thus far as “ambivalence” on whether decoupling advances traditional regulatory objectives, and states have responded differently to the question of whether revenue decoupling is a desirable ratemaking mechanism. The National Association of State Utility Consumer Advocates (“NASUCA”) opposes decoupling mechanisms because they would guarantee utilities the recovery of predetermined level of revenues without regard to the amount of energy sold or the cause of lost revenues between rate cases.

The debate in state regulatory commissions has focused

on whether it is the best approach in advancing the interests of customers. Skeptics claim decoupling is akin to taxing consumers to protect utilities, which has led some state commissions addressing decoupling programs to make a down-

*While there are significant variations in proposed and existing decoupling programs, a basic decoupled rate structure or design is a method intended to allow utilities to actively promote energy efficiency while preventing the erosion of margins generally associated with those efforts.*

ward adjustment of the utility’s authorized rate of return as “compensation” for this reduced risk or otherwise condition approval on additional dollar or benchmark commitments to energy efficiency. Skeptics also maintain that guaranteeing revenues removes some of the strongest incentives for companies to cut costs and become more efficient between rate cases. Like most regulation, the ultimate decision on going forward with decoupling rests with weighing the costs and benefits. If decoupling – now still largely in an experimental stage in the ten states studying it – can be shown to result in only slightly higher short-term rates while bringing large benefits in the area of efficiency, revenue decoupling is likely to advance in other states as well,

including Virginia.

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## Climate Change and Associated Energy Issues *(continued)*

electric-energy consumption over the next 10 years; it finds that reaching even the lower 10 percent goal would defer or postpone the need for approximately 3,900 megawatts of new electric generation capacity by 2022, equivalent to four or five large generation stations. Among the Plan's recommendations are a 40 percent reduction in the growth rate of energy use, a 30 percent reduction in GHG emissions by 2025, and the establishment of a Commission on Climate Change to make a more comprehensive assessment of GHG issues and develop a plan for reaching GHG-emission reduction goals.<sup>1</sup>

Reducing the growth rate of electric-energy use is the focus of Case No. PUE-2007-00089, in which Dominion sought expedited approval to implement several small-scale energy-efficiency and conservation pilot programs. The Commission issued its Final Order on January 17, 2008 approving the nine pilots and finding them necessary to acquire information which may be in the public interest as it relates to reducing energy demand by 10% by 2022. The Commission refrained from determining the recoverability of the costs through rates associated with the pilots. The Commission cautioned Dominion to be prepared to rapidly expand any portion of the pilots which prove to be cost-effective.

Despite its proposed pilot programs and interest in renewable energy sources, Dominion remains committed to large-scale generation, including nuclear and coal. On November 28, 2007, Dominion filed an application with the U.S. Nuclear Regulatory Commission (NRC) for a license to build and operate a new nuclear reactor at its North Anna Power Station in central Virginia. The NRC issued an early site permit for the North Anna facility on November 20, 2007. Earlier in the year, on July 13, 2007, Dominion filed an application with the SCC for approval and certification of a \$1.62 billion coal-powered generation facility in Wise County, Virginia.<sup>2</sup> Although the 585-megawatt plant is expected to emit 25 million pounds of pollutants into the air annually, Dominion also requested certain financial incentives as provided in the reregulation legislation including an enhanced rate of return ("ROR") of 200 basis points, for

building what it describes as a "clean coal, carbon capture compatible" facility. The SCC is scheduled to convene a hearing on Dominion's application, Case No. PUE-2007-00066, on February 5, 2008. Meanwhile, the Virginia Department of Environmental Quality (DEQ) is reviewing Dominion's application for an air-quality permit, which was initially filed in July 2006. On November 30, 2007, the Air Pollution Control Board of the Virginia DEQ voted 3-1 to request that Dominion propose a less-polluting plant and on December 4, 2007, the U.S. Forest Service notified the Virginia DEQ that the anticipated annual emission of 3,300 tons of sulfur dioxide from the plant would violate federal clean-air laws. The DEQ anticipates issuing a Notice of Draft Permit for public comment on Permit No. 11526 in early January 2008.

*Also as part of the re-regulation legislation, the General Assembly announced a stated goal of reducing, by 2022, retail customers' consumption of electric energy by an amount equal to 10 percent of the amount of 2006 retail electric-energy consumption.*

About the Author: Susan M. Hafeli is a Utility Analyst with Fairfax County. Prior to joining the County, Susan was an attorney in private practice, advising and representing clients in transactional, litigation, and federal and state regulatory matters

<sup>1</sup> Editor's note: On January 22, 2008, Appalachian Power Company filed the first plan with the SCC for meeting the state goals for electric generation from renewable sources. The Company's news release is available at: <http://www.appalachianpower.com/news/releases/viewrelease.asp?releaseID=472>

<sup>2</sup> Since filing, the updated cost of the plant is now estimated at approximately \$1.8 billion.

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