

IN THE SUPREME COURT OF VIRGINIA

PIEDMONT ENVIRONMENTAL COUNCIL, )  
 )  
 ) *Appellant*, )  
 )  
 )  
v. ) Record No. \_\_\_\_\_ )  
 )  
VIRGINIA ELECTRIC & POWER COMPANY, )  
D/B/A DOMINION VIRGINIA POWER, )  
TRANS-ALLEGHENY INTERSTATE LINE COMPANY, )  
STATE CORPORATION COMMISSION, )  
THE ATTORNEY GENERAL OF VIRGINIA AND )  
VIRGINIA OUTDOORS FOUNDATION, )  
 )  
 )  
 ) *Appellees.* )

**MOTION OF PIEDMONT ENVIRONMENTAL COUNCIL TO GRANT THE PETITION FOR APPEAL, VACATE THE ORDER APPEALED FROM AND REMAND THE CASE FOR FURTHER PROCEEDINGS**

Appellant, Piedmont Environmental Council (“PEC”), by its counsel, moves the Court for an order granting its Petition for Appeal, vacating the order appealed from and remanding the case to the State Corporation Commission (“Commission”) for further proceedings.

**Introduction**

This is an extraordinary motion prompted by extraordinary circumstances. The facts and assumptions upon which the State Corporation Commission predicated its decision to approve the construction of the Virginia portion of a new 500 kV electricity transmission line have changed dramatically since the Commission entered its October

7, 2008, order (attached hereto as Exhibit 1), from which the present appeal is taken (attached hereto as Exhibit 2). The drastic decline in the national economy and the economy of the relevant multi-state region has significantly affected the demand for electricity in the area to be served by the transmission line at issue. There is no present or near-term need for the new transmission line if the reduced level of demand for electricity that is now projected by disinterested expert sources and the expert on whom the applicants relied is substantially accurate.

### **Factual Summary**

On October 7, 2008, Virginia Electric and Power Company, doing business as Dominion Virginia Power, and Trans-Alleghany Interstate Line Company (collectively, "the Applicants") obtained an order from the Commission authorizing construction of the Virginia portion of a three-state, 250-mile-long, extra high voltage electricity transmission line ("the line"). The Applicants projected, and the Commission assumed, increasing levels of demand for electricity in the area to be served that would result in violations of applicable transmission reliability planning standards in 2011 and thereafter. The dramatic economic downturn that has occurred since the Commission received evidence has resulted in substantially lower than projected demand for electricity. John Reynolds, Senior Vice President of

PJM Interconnection, L.L.C. ("PJM"),<sup>1</sup> who testified as an expert in support of the applications before the Commission, has significantly modified his demand projection since the Commission's order was entered on October 7, 2008.

**The Court Should Take Judicial Notice of What Is Common Knowledge Regarding the Current Economic Downturn, as Well as Authoritative Reports Regarding Recent Economic Activity and Its Effect on the Demand for Electricity.**

Judicial notice of the obvious decline in economic conditions since the date of the hearing officer's report is appropriate in these circumstances. It is a matter of common knowledge that economic conditions today are substantially different from those of a year ago. In *McClintock v. Royall*, 173 Va. 408, 4 S.E.2d 369 (1939), the Court took judicial notice of the fact that the "nerve-racking, deplorable" economic circumstances in 1935 were "a far cry from the affluent conditions of 1914." 173 Va. at 416, 4 S.E.2d at 372. Similarly, the Court has taken judicial notice that under the depressed business conditions that existed in the

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<sup>1</sup> PJM is a federally regulated regional transmission organization ("RTO") that assures the reliability of the electric transmission system in 13 states and prepares an annual Regional Transmission Expansion Plan ("RTEP") in order to analyze the electric supply needs of the customers in the PJM region. Testimony of Steven R. Herling, Vice President of PJM (attached hereto as Exhibit 3 at 3-4). The RTEP permits other providers "the opportunity to address identified system needs in a manner that *might delay or even obviate* a transmission solution first identified in the RTEP." *Id.* at 4-5 (emphasis added).

early 1930s, an enterprise that was able to earn a net return of as much as 4.98% on its assets was exceptional and the few enterprises were able to do so. *Alexandria Water Co. v. City of Alexandria*, 163 Va. 512, 543, 177 S.E. 454, 466 (1934). See also *Southern Ry. Co. v. Com.*, 124 Va. 36, 64, 97 S.E. 343, 351 (1918) (Court took notice of difficulty in obtaining construction materials during World War I); *Koteen v. Bickers*, 163 Va. 676, 690-91, 177 S.E. 904, 909-10 (1934) (Court noticed that prudent investor lost money on first mortgage loans during period of inflated property values); *West Brothers Brick Co. v. City of Alexandria*, 169 Va. 271, 281, 192 S.E. 881, 885 (1938), *reh. denied*, 302 U.S. 781 (1938) (Court took notice of public and social developments); *VEPCO v. Com.*, 169 Va. 688, 706-07, 194 S.E. 775, 782 (1938) (Court found that it was common knowledge that railroads were meeting strong competition and that some might not survive); *Mumpower v. City of Bristol Housing Auth.*, 176 Va. 426, 437, 11 S.E.2d 732, 735 (1940) (Court acknowledged nature and impact of slums); *Guaranty Trust Co. v. Seaboard AirLine Ry. Co.*, 68 F.Supp. 304, 308 (E.D. Va. 1946) (Court concluded that it was a matter of common knowledge that not only have wages been already greatly increased in 1946, but still greater increases might be asked by employees of the railroad).

PEC also asks the Court to take judicial notice of the following documents prepared by governmental agencies and a regional transmission organization ("RTO") established pursuant to federal law for the purpose of forecasting energy demand:

- Report of the Federal Reserve Board of the United States for the Fifth District – Richmond (January 14, 2009) (attached hereto as Exhibit 4);
- U.S. Census Bureau Report of Economic Indicators (January 22, 2009) (attached hereto as Exhibit 5);
- Review of PJM RTO Summer 2008 Loads by John Reynolds (November 12, 2008) (attached hereto as Exhibit 6);
- Department of Energy's Annual Energy Outlook 2009 Early Release (December 12, 2008) (attached hereto as Exhibit 7);
- Excerpt from PJM Load Forecast Report (January 2009) (attached hereto as Exhibit 8);
- Excerpt from PJM Load Forecast Report (January 2008) (attached hereto as Exhibit 9); and
- Pre-Filed Direct Testimony of John M. Reynolds before the New Jersey Board of Public Utilities (January 12, 2009) (attached hereto as Exhibit 10).

Va. Code § 8.01-388 (requiring a court to take judicial notice of the contents of all official publications of the federal government, among others); see *Morse v. Lewis*, 54 F.2d 1027, 1029 (4<sup>th</sup> Cir. 1932); *Insurance Co. of N. America v. Nat'l Steel Serv. Ctr., Inc.*, 391 F.Supp. 512, 518 (N.D.

W.Va. 1975); *Scafetta v. Arlington County*, 13 Va. App. 646, 648-49, 414 S.E.2d 438, 439-40 (1992).

**The Court Should Remand the Case to the Commission to Consider New Information Which, If Accurate, Would Negate the Need for a New Transmission Line.**

A motion on appeal to vacate an order of a lower tribunal and remand the case to that tribunal for further proceedings in light of new, relevant information has strong precedent. In *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the United States Supreme Court vacated an order of a federal district court and remanded the case for further consideration by the Interstate Commerce Commission in light of events that had occurred after the district court had ratified an order of the ICC determining the value of certain corporate stock.<sup>2</sup> Those intervening events indicated that the stock value predicted by the ICC was possibly overstated. *Id.* at 488-89.

In issuing a certificate for a new transmission line, the Commission is required by law to “determine” that the line is needed....” Va. Code § 46.1B. The Commission adopted the hearing officer’s finding that “sufficient Virginia need has been shown to give full weight to the line’s

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<sup>2</sup> A motion to grant a petition for appeal or for a writ of certiorari, to vacate the order appealed from, and to remand for further proceedings is a well-established procedure in the United States Supreme Court and is commonly referred to as a motion for a “GVR” order. See, e.g., *Lords Landing Village Condominium Council v. Continental Ins. Co.*, 520 U.S. 893, 897 (1997); *Lawrence v. Chater*, 516 U.S. 163, 165-75 (1996).

regional need.”<sup>3</sup> The new circumstances that have come to bear on this critical issue of the need for the transmission line that is the subject of this appeal are factors that the Commission would presumably want to consider and should consider in the exercise of its constitutional responsibility to regulate electric utility companies in the public interest. Va. Const., Art. IX, § 2. The General Assembly has required the Commission to “verify the applicant’s load flow modeling,” among other things, in determining the need for a new transmission line. Va. Code § 56-46.1B. The fact that the assumptions incorporated in, and forming the basis for, the load flow modeling in this case have been brought into serious question by extraordinary events that have occurred since the Commission made its need determination militates in favor of remanding the case to the Commission to allow it to review that determination in light of more recent data.

As noted above, it is common knowledge that there has been a dramatic decline in economic activity, which in turn has led to a sharp fall-off in demand for electricity. In addition, there is overwhelming evidence in the form of reports generated by disinterested expert sources indicate a

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<sup>3</sup> Relevant excerpts of the July 28, 2008, Report of Hearing Officer Alexander F. Skirpass, Jr. are attached hereto as Exhibit 11. The language quoted in the text above is found at page 197. The hearing officer noted the importance of basing his decision on the most current data. *Id.* at 2.

sharp decline in economic activity and a substantial reduction in projected demand for electricity in the relevant service area.

After the evidentiary hearings closed in the proceedings in this case, the national economy began to experience its worst constriction in decades. The Federal Reserve Board of the United States reported a sharp decline in economic activity during the fourth quarter of calendar year 2008.<sup>4</sup> The United States Census Bureau reported a drop in sales of residential real estate.<sup>5</sup> The United States Department of Energy's Energy Information Agency released a report in January 2009 acknowledging the decline in electricity demand and projecting further decline in 2009.<sup>6</sup>

The most telling report, perhaps, is that prepared by an expert on whom the Commission relied. In a November 12, 2008, report, Mr. Reynolds of PJM, a load forecasting expert witness on whom the Commission based its October 7, 2008, need determination, stated that the actual unrestricted peak demand for the summer of 2008 in PJM's region was 10,591 megawatts *lower* than the summer 2007 peak demand and 7,156 megawatts (or 5.2%) *lower* than the forecast for 2008 that Mr.

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<sup>4</sup> Exhibit 4.

<sup>5</sup> Exhibit 5.

<sup>6</sup> Exhibit 7.



Reynolds had previously made.<sup>7</sup> In addition, PJM released a 2009 Load Forecast in January 2009 in which PJM assumed a 4,929 megawatt decrease in the projected electric load for the region in the decision-critical 2011 time frame.<sup>8</sup> In testimony submitted to the New Jersey Board of Public Utilities on January 12, 2009, Mr. Reynolds stated:

Based on the current economic outlook, PJM expects the 2009 Load Forecast Report, currently in draft form, to show lower summer peak loads for all Zones and LDAs for the years 2009 through 2011. PJM expects summer peak loads to rebound to levels that are approximately one to two percent lower than the loads in the 2008 Load Forecast Report for the years 2012 through 2016. PJM expects summer peak loads for the PS zone to be approximately one percent lower and the PLGrp zone to be three to four percent lower in those years compared to the 2008 Load Forecast Report.

The foregoing information was not available to the Commission when it entered its order issuing certificates of public convenience and necessity in this case. Because that information obviously brings into question the reasonableness of the demand projections on which the Commission relied, the Commission should be accorded an opportunity to reconsider its October 7, 2008, order in light of this new information.

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<sup>7</sup> Compare Exhibit 9, attached hereto with Exhibit 12, attached hereto.

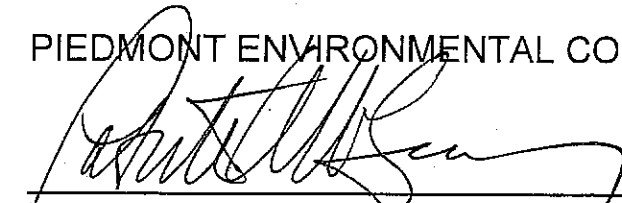
<sup>8</sup> Compare "PJM-RTO" in Exhibit 4, attached hereto, at page 32 with "PJM-RTO" in Exhibit 5, attached hereto, at page 31.

Conclusion

Based on the foregoing, PEC requests an order granting its Petition for Appeal, vacating the October 7, 2008, order of the State Corporation Commission from which this appeal is taken, and remanding the case to the Commission for further proceedings.

Respectfully submitted,

PIEDMONT ENVIRONMENTAL COUNCIL



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## CERTIFICATE OF SERVICE

I certify that on February 9, 2009, copies of this Motion To Grant The Petition For Appeal, Vacate The Order Appealed From And Remand The Case For Further Proceedings were hand filed with the Clerk of the Supreme Court of Virginia and copies were mailed to:

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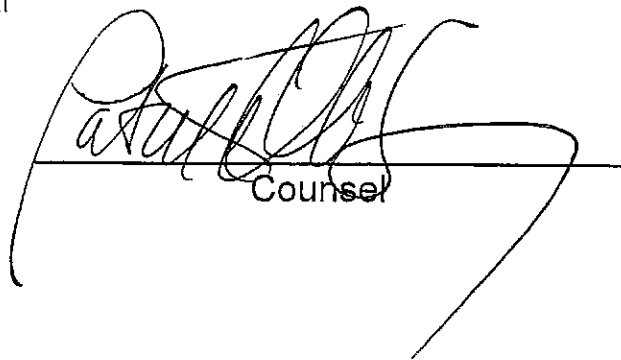
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