

NATURAL RESOURCES, ENERGY & ENVIRONMENTAL LAW SECTION of the State Bar of New Mexico

WINTER 2000

NATURAL RESOURCES,
ENERGY & ENVIRONMENTAL
LAW SECTION

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THE ELECTRIC UTILITY INDUSTRY RESTRUCTURING ACT OF 1999: EARLY STEPS TOWARD IMPLEMENTATION

By Patrick T. Ortiz - Senior Vice President, General Counsel and Secretary

On April 8, 1999, the Governor signed into law a landmark piece of legislation. The Electric Utility Industry Restructuring Act of 1999 provides for the orderly transition from a regulated monopoly structure to a competitive marketplace for retail sales of electricity. Codified at N.M. Stat. Anno., §§ 62-3A-1 to 23, the Restructuring Act provides a comprehensive framework for this transition, although much remains to be done to flesh out the overall structure. The Legislature leaves this to the Public Regulation Commission, within the guidelines established in the Restructuring Act.

Retail electric service can be classified into three basic components: generation (or more broadly, power supply), transmission and distribution. The Restructuring Act makes power supply competitive and deregulates it, subject to residual regulation around customer protections. Transmission and distribution remain regulated monopolies. In order to facilitate the competitive marketplace in power supply, transmission and distribution systems are required to provide access for all customers and power suppliers so that customers are able to choose from whom they wish to buy their electricity and have it delivered over the lines of the utility company, essentially a common carrier function. In order to avoid discriminatory conduct favoring its own power supplies over those of competitors, the Restructuring Act requires utilities to separate their regulated businesses from their competitive businesses into at least two separate corporations prior to the scheduled start date of customer choice, or open access. In turn, behavioral rules (called "Code of Conduct") are required to govern the relationships and conduct of the utilities to all other suppliers. Unless the Commission finds

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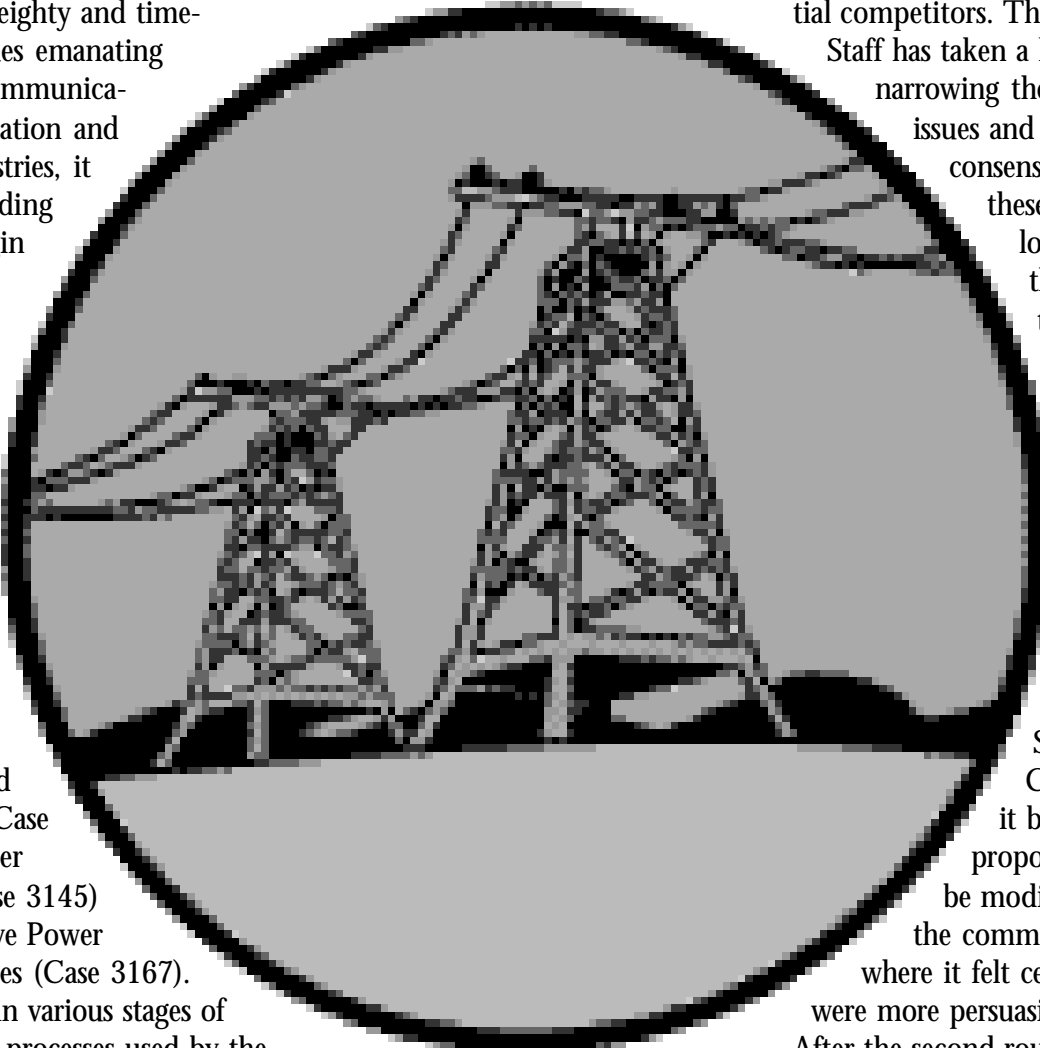


that more time is needed in order to properly implement restructuring, in which case the Commission can extend dates up to one year, all orders must be in place by December 1, 2000, so as to allow customer choice for residential, small business and educational institution customers on January 1, 2001.

Although the Commission is burdened by weighty and time-consuming issues emanating from the telecommunications, transportation and insurance industries, it is somehow finding the time to begin the process of implementing the Restructuring Act. Currently, it has issued notices of proposed rulemakings on four critical subjects: Code of Conduct (Case 3106), Standard Offer Service (Case 3109), Customer Protection (Case 3145) and Competitive Power Supplier Licenses (Case 3167). These cases are in various stages of the rulemaking processes used by the Commission to obtain public comment on proposed rules. This article will focus on the Code of Conduct rulemaking.

The Restructuring Act prohibits the utility company, i.e. the company that owns the wires that delivers electricity, from discriminating against any competitive power supplier. All competitors must be

treated fairly by the utility company and have equal opportunity to have access to the transmission and distribution system and to customer and network information. The utility company is prohibited from providing more favorable treatment to its competitive affiliate than it would to non-affiliated competitors. In addition, the Restructuring Act



prohibits cross-subsidies between the utility and its affiliates. The Act specifically requires a code of conduct for each utility to assure compliance with these general mandates. Case 3106 is the Commission's proceeding to adopt the rules necessary to implement these provisions of the Act.

The Commission has received

two rounds of written comments on its proposed Code of Conduct rules and has conducted a hearing to receive oral comments from the public. The Commission has left the record open to receive additional written comments until December 6, 1999. Parties filing comments included customers, customer representatives, utilities, and potential competitors. The Commission

Staff has taken a leadership role in narrowing the controversial issues and driving towards consensus on what

these rules should look like. Initially, the Staff parsed through the first round of written comments and provided an analysis of those comments in its own second round of comments. The Staff advised the Commission how it believed the proposed rules should

be modified based on the comments, suggesting where it felt certain arguments were more persuasive than others. After the second round of comments, Staff sponsored a workshop for all parties to discuss proposed changes to suggest to the Commission. The workshop resulted in further consensus, greatly assisting the Commission in being able to zero in on the areas of disagreement.

Even though open access is not supposed to start until January 1, 2001, at the earliest, and much



preparation is underway to properly implement it according to the Restructuring Act, New Mexico is already experiencing the forces of competition. Customers want to be able to start shopping so they will have power supplies lined up when the market actually “opens”. Potential suppliers want to be able to talk to customers so they will have their deals in place as well. The Restructuring Act allows for the broadest customer choice, allowing the incumbent utility to separate its power supply assets into a separate corporation and compete fairly. But no one is allowed to offer competitive power supplies for retail sale in New Mexico without a license. As customers began to explore their options, the question arose as to whether or not a public utility which had not separated its functions could be granted a competitive power supplier license. The process for separation could take many months thus inhibiting the incumbent power supplier from being a choice for customers contrary to the intent of the Act. But there was a concern with allowing the utility to offer competitive power supplies prior to separation because of the potential anti-competitive conduct or the appearance of favoritism. The proposal to the Commission that appears to have widespread support is for a transitional provision that allows a utility to get the license on a temporary basis pending separation

with the requirement that the Code of Conduct applies. Effectively, that requires the utility to do internal separations, not unlike what has been required by federal law on the wholesale side, that reflects the legal separation to come.

The Act prohibits “unfair competitive advantages”, not all competitive advantages. As a result, it is appropriate to allow the utility and its competitive affiliates to take advantage of legitimate economies of scale and scope, which also inures to the benefit of customers in the form of reduced prices, both on the regulated side and on the unregulated side. Otherwise, incumbent power suppliers are placed at an unfair competitive disadvantage that could impose an artificial pricing umbrella protecting inefficient power suppliers by driving prices higher than they would otherwise be under an efficient market system.

The initial proposed rules would have prohibited the sharing of telecommunications, computer and information systems between the utility and affiliates. The purpose behind the specific prohibition was to comply with the Act’s prohibition against sharing of information that would give an affiliate an unfair competitive advantage. But the practicalities of the situation are that such a flat-out ban went too far with the possibility of adverse, unintended consequences, when less drastic regulations are sufficient to

achieve the intended purpose. As the rulemaking process progressed, support coalesced around a requirement that information systems contain firewalls, password requirements and other security measures designed to achieve the confidentiality required by the Act.

It has been about seven months since the Restructuring Act became law. Much has been done in preparation for its implementation, but much, much more remains to be done. The Code of Conduct rulemaking is a cornerstone of the structure being put in place. Either late this year or early next year, the Commission will adopt final rules for this critical piece of the puzzle. It is also proceeding with other rulemakings. March 1, 2000, is a critical date. That is the deadline for utilities to file their transition plans which will lay out specific proposals for implementing the Act and the rules. In order to try and simplify the process, PNM has filed the separation plan component of the transition plan early in hopes that such a process will facilitate Commission decision-making and timely implementation of customer choice. There’s a long road ahead. It should prove to be an exciting and challenging journey.



CONSUMPTIVE USE:

Statutorily Undefined But an OSE Standard

By Jeffrey H. Albright, Eastham, Johnson,
Monnheimer & Jontz, P.C.

Consumptive use is not defined in New Mexico statutes. Statutory references are made to consumptive use of water only in our interstate compacts. Nonetheless, it is central to water rights administration and is determined by the Office of the State Engineer (OSE) using complex factors. State Engineer Technical Report No. 32 (Blaney and Hanson, 1965) defines consumptive use as "The unit amount of water used on a given area in transportation, building of plant tissue, and evaporation from adjacent soil, water surface, snow, or intercepted precipitation in a specified time." The amount of consumptive use varies with, among other things, temperature, length of day, and available moisture, (e.g., both humidity and rainfall) in a given location.

Simply stated, consumptive use is the amount of water actually consumed or used. It is always less than the diverted amount. Only the consumptive use amount can be transferred to a different location or purpose of use. For example, in the Belen area of the Middle Rio Grande, for every 3.0 acre-feet of diversion (every acre of irrigated land), the consumptive use is 2.1 acre-feet per acre. Many other areas of the state are considerably less. If approved by the OSE, only the amount of consumptive use calculated on the total acre feet requested will be available to move to another location.

DRAFT MINUTES OF THE BOARD OF DIRECTORS MEETING OF THE SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW

OCTOBER 22, 1999
THE SWEENEY CENTER
SANTA FE, NEW MEXICO.

I. INTRODUCTION OF BOARD MEMBERS, COMMITTEE CHAIRS, SECTION MEMBERS AND GUESTS.

The Board meeting commenced at 5:30 P.M. In attendance were Steven L. Hernandez, Mike Cadigan, Greg Nibert, Tracy Hughes, Karen Fisher, and Lettie Belin. Also in attendance was Marte Lightstone. Steven L. Hernandez agreed to take minutes.

II. APPROVAL OF MINUTES, July 30, 1999 MEETING.

Minutes for the July 30, 1999 Meeting was approved.

III. BUDGET REPORT.

A. *CURRENT BUDGET STATUS.*

Mike Cadigan reported that he had checked into contributions from the section to the UNM Law Library. It had been several years since there was a contribution to purchase any resource-oriented materials. Steven L. Hernandez pointed out that there were some items on the current budget that would not utilize the full amounts budgeted. The Law Reporter, Lecture Series and Student Writing Paper Award would have about \$2,000 left over. He asked that the board consider making a \$2,000 contribution to the Albert E. Utton Natural Resources Award. The annual award goes to a third year law student who has demonstrated outstanding achievement in natural resources law.

B. *ALBERTE. UTTON AWARD.*

Upon motion duly made and seconded, the board authorized Steven L. Hernandez to make a \$2,000 contribution to the Albert E. Utton Natural Resources Award in the name of the section. The funds are to come from the line items of the Law Reporter, Lecture Series and Miscellaneous-Sections as needed.

IV. NOMINATING COMMITTEE REPORT.

Steven L. Hernandez has agreed to be the incoming chair of the Section. Maria O'Brien will be asked to continue on as Budget Officer. If she declines, Marte Lightstone will consider taking the position.

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V. **CLE COMMITTEE REPORT.**

The seminar on Environmental Law Update was well attended. We thank all of our section members that attended.

VI. **NATIONAL SONREEL CONFERENCE IN SAN DIEGO.**

Mike Cadigan reported that the ABA SONREEL section has changed its name to Section on Resource Law. No one felt a need to change our section's name to follow suit at this time.

VII. **NEWSLETTER.**

Section members are encouraged to submit articles. The newsletter is only as good as what the members provide. Kathy Blackett is the newsletter editor and you can submit your articles to her at P.O. Box 25687, Albuquerque, NM 87125. Ms. Blackett's fax number is 243-4408 and her telephone number is 842-1950 should you wish to fax your articles.

XII. **OLD BUSINESS.**

None.

XIII. **NEW BUSINESS.**

Steven L. Hernandez reported that the Section's Spring 2000 seminar on using the Internet in the various disciplines in the Section is proceeding forward. He has spoken to Steve Meilleur about combining the seminar with a hands on workshop on a Saturday at the Law School. He needs volunteers in each of the disciplines of the section to brainstorm some ideas about what agencies they deal with that could make a presentation. For example, the Office of the State Engineer, BLM, Bureau of Reclamation, Etc. Call Steve with any ideas at 505-526-2101 or fax at 526-2506.

He suggested we could get someone from the Department of Interior in Washington D.C. to come out and explain what information is available. The various state agencies in water, mining, oil and gas, etc. could also make presentations.

XIII. **ADJOURNMENT.**

5:45pm

Air Quality Regulation for the Natural Resources Industry

February 17 & 18
Salt Lake City, - Utah

Sponsored by
Rocky Mountain Mineral
Law Foundation

12.9 General
MCLE Credits

The Rocky Mountain Mineral Law Foundation is sponsoring a Special Institute on Air Quality Regulation, which will provide a comprehensive overview of the various programs under the Clean Air Act which directly or indirectly affect natural resources development.

Who should attend?
Attorneys, government regulators, and corporate managers with responsibility for air pollution issues as they affect the development of natural resources should attend this uniquely focused program.

For more information
(303) 321-8100



VISIT SONREEL ON THE WEB



Our Web page is up and running!

Visit us at

[http://www.nmbar.org/membersonly/
naturalresources/natresourceslaw.htm](http://www.nmbar.org/membersonly/naturalresources/natresourceslaw.htm)



NEW MEXICO SONREEL DIRECTORY

The New Mexico Section on Natural Resources, Energy and Environmental Law will publish a directory of attorneys practicing in the natural resources areas.

Please provide the following information for inclusion in the directory and fax (505-764-5480) or mail (PO Box 1276, Albuquerque, NM 87103-1276) to Jeffrey H. Albright or Ro Saavedra at Eastham Johnson Monnheimer & Jontz, P.C. no later than April 15, 2000.

CHECK THE FOLLOWING AREAS OF PRACTICE

- Oil & Gas
- Energy
- Water
- Environmental Regulation & Compliance
- Environmental Tort
- Mining
- Other _____

Name: _____

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