

President's Message



The change in seasons brings with it many exciting activities and developments for the Energy Bar Association. We encourage each of you to participate in the upcoming Mid-Year Meeting on December 1, 2011. We anticipate having a senior official from the Environmental Protection Agency as our guest speaker for the luncheon.

The evening of December 1, 2011, we invite you to join us for the Charitable Foundation of the Energy Bar Association's Annual Charity Auction & Gala. On December 2, 2011, the Association will be hosting a Primer on Legal Practice and Administrative Procedure before the Federal Energy Regulatory Commission. This event is worthy of attendance by the seasoned professionals, as well as those new to or just entering practice before the Federal Energy Regulatory Commission.

Speaking of those new to the energy practice, the Young Lawyers Committee will be hosting its fourth annual cocktail reception on

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Ted Gerarden, Top Trial Lawyer at the Federal Energy Regulatory Commission, Reveals the Big Issues Looming for Litigation

With Decades of Experience, FERC's New Director of the Office of Administrative Litigation has Many Insights that he Shares in Exclusive Interview

Gary E. Guy and Channing D. Strother



A short stroll north from the train station on First Street, N.E., past the "888" headquarters for the Federal Energy Regulatory Commission, is a sparkling building that houses a single tenant, namely, FERC's Office of Administrative Litigation. OAL's Director, Ted Gerarden, reports directly to the FERC Chairman. Reporting to Mr. Gerarden are: an Administrative and Operations Chief and Dispute Resolution Service Chief; three Directors (or Acting Directors in some cases): those heading up the Legal Division, with four Branches; Technical Division I, consisting of Engineering Analysis and Competition Analysis Branches; and Technical Division II, with four Branches. OAL handles hearings before FERC's Administrative Law Judges, and participates in settlements of cases headed for hearings. It is composed of

lawyers and experts, is NOT under the Office of the General Counsel, and has no Advisory Staff function; it is FERC's Trial and ADR Staff.

It was, therefore, an especially exciting visit that your reportorial team Gary Guy and Channing Strother (aka "Lawrence E. Spivak and Bill Monroe") had with Ted Gerarden, both in being given a guided tour by him of the impressive "L.A.-style" floor-to-ceiling-window layout of the Office and in talking with him at length about his responsibilities, his distinguished career, and his view of what is lingering on the horizon for FERC practitioners. Here now is a recap of our most interesting conversation, beginning with how Ted Gerarden got to be where he is, and managed to obtain the perfect background to fill his enormously important position.

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News from the Charitable Foundation of the Energy Bar Association

Marcia C. Hooks, Walter R. Hall, II and Katherine C. Zeitlin

CFEBA Will Hold Silent Auction At Its Annual Gala

The CFEBA will host a silent auction at its Annual Gala on Thursday, December 1, 2011 in conjunction with the EBA Mid-Year Meeting at the Grand Hyatt Hotel in Washington, DC. The funds will be used for energy related charitable activities, as well as other community service projects targeting energy efficiency techniques. Since its inception in 2002, the CFEBA has awarded more than \$950,000 to deserving national and international organizations.

EBA members' participation is very much needed to ensure a successful gala. To help in this worthwhile endeavor, members and their employers may contribute IN SEVERAL WAYS. They may PROVIDE CASH DONATIONS OR EVEN SPONSOR THE GALA. THEY MAY ALSO CONTRIBUTE items to be auctioned. Popular past auction items include: wine and gift baskets; tickets to sporting events or theater performances; sports memorabilia; vacation rentals; a catered dinner by a personal chef (who could be you and hosted in your home); gift cards and gift certificates to stores, restaurants, or spas; autographed anything; lunch/dinner with a famous person you know.

In addition, the CFEBA is very excited about the gala's second annual "Team Competition." The CFEBA encourages you to form a "Team," which will donate an item or basket of items to be auctioned. The Team that generates the highest winning bid for its silent auction entry will receive recognition in the EBA newsletter and bragging rights until next year's silent auction. It's a friendly competition between friends, law firms, and companies, and you have the added satisfaction of knowing that proceeds from your donation will be used to assist worthy organizations' energy-related activities. Please contact Michele Duehring with any questions or for more information at (202) 223-5625 or email her at michele@eba-net.org.

We encourage you to bring a friend or colleague, as well as your checkbook or credit card, to support the CFEBA's annual gala!

CFEBA Will Host Habitat Build Day in Montgomery County, Maryland

Although the CFEBA has hosted several successful Habitat Build Days in Northern Virginia and the District, it will be the first time that it has teamed up with Habitat for Humanity of Montgomery County, Maryland (HFH-MC). The community service project is scheduled for Saturday, November 5, 2011 from 8:15 a.m. to 3:00 p.m. Participants will help to renovate an existing home near Colesville Road in Silver Spring, Maryland, which will be for the benefit of a low income family. There is no need to concern yourself about a lack of experience in home renovations because there will be skilled Habitat staff on site to help volunteers with the specific tasks. Thanks to our members' volunteer

spirit, we have the number of volunteers required to make this a successful endeavor. HFH-MC will provide lunch and a T-shirt to each participant.

HFH-MC is an affiliate of Habitat for Humanity International. Since 1982, HFH-MC has been partnering with the community and low-income families living in substandard conditions to build simple, decent, affordable housing. CFEBA appreciates the volunteer spirit of its EBA members and is excited about partnering for the first time with HFH-MC to host the Habitat Build Day.



CFEBA and Young Lawyers

Committee Co-sponsor Tree Planting Service Project

On Saturday, October 15, 2011, approximately 20 members of the Energy Bar Association gathered at Capital Quarter, near Capitol Hill in Washington D.C., to assist in the planting of 17 trees under the supervision of Casey Trees, an arborist organization. The activity was sponsored by the EBA Young Lawyers Committee and EBA's Charitable Foundation, the latter of which provided a grant of \$2,500 to purchase the trees. The trees were planted at Virginia Avenue, 4th & I Streets, S.E., at the edge of a new community including dedicated low-income housing near the Navy Yard. Expanded tree cover in urban areas helps to clean the air of tons of harmful pollutants each year (an estimated 540 tons in D.C. alone), curbs storm water run-off, provides a wildlife habitat for birds and squirrels, can reduce energy costs in nearby

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News from CFEBA Continued

houses, raise property values, and sequester carbon from the atmosphere. The tree planting (from 9:00 am to noon) was followed by an excellent lunch with a Mexican motif provided by the community association.

Casey Trees, who organized and supervised the event, was established in 2002 as a non-profit organization with the mission to “restore, enhance and protect the tree canopy of the Nation’s Capital.” According to its website, in the late 19th Century, the quantity and diversity of tree species located in Washington earned the District the moniker “City of Trees.” However, during the last decades of the 20th Century, tree cover in the District declined 64%. Since its founding, Casey Trees has reversed this process, planting over 10,000 trees in all eight wards of the District. (See <http://caseytrees.org/about/mission>.)

EBA members participating in the tree planting included Niranjana Adhikari, Oded Cedar, Marco DeSousa, Caileen & Dustin Gamache, Olena Gulyanytska, Walter Hall, Stephen Howe, Alex Jacoby, Rebecca Kamaluddin, Kathy Konieczny, Kelli Lozier, Jennifer Mansch, Michael Messonnier, Christine A. Powell, Sanda Safro, Kevin Siqveland, Sean Tshikororo and Jason Wool.



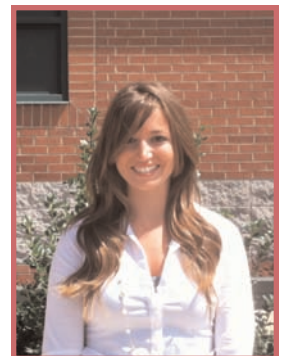
CFEBA Interns Reflect on Their Summer Work Experiences

The CFEBA sponsored four interns this past summer, who worked at the Federal Energy Regulatory Commission and three state public service Commissions. Below the interns recount the interesting work tasks, how they benefitted from these professional experiences; and express their appreciation to the CFEBA and their employers.

Sarah Cate - Kentucky Public Service Commission

My experience at the Kentucky Public Service Commission (KPSC) was an extremely educational and fulfilling one. I am very grateful to the Charitable Foundation of the Energy Bar Association for the generous grant that funded my internship and will hopefully jumpstart my career in energy law

I had the privilege of getting an inside look at the inner-workings of an administrative regulatory agency, focusing almost entirely on the electricity industry and working closely with both cooperatives and investor-owned power companies. This position allowed me to learn both the legal and technical aspects of energy regulation through group work involving PSC members from every department within the agency.



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News From CFEBA *Continued*

My research projects ranged from the strength of the filed-rate doctrine to the regulation of wind energy projects. In addition to research, I was included in many educational seminars and able to attend formal hearings before the Commission, including that for the merger of Duke Energy Corp. and Progress Energy, Inc., a step towards creating the largest utility in the country. The parties involved in the merger were kind enough to allow me to attend all of the settlement meetings and informal conferences involved in negotiating the terms, providing me with invaluable insight into a transaction of such magnitude. Other events that I attended included presentations by Duke University's Nicholas Institute for Environmental Policy Solutions, Midwest Independent Transmission System Operator, Inc. (MISO) and PJM Interconnection LLC.

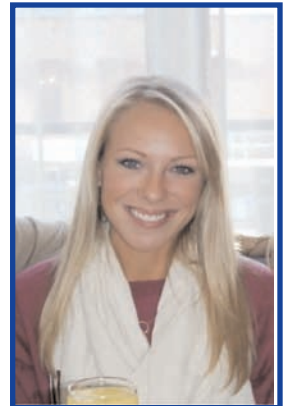
In June, I went with several KPSC staff members to an open house for a Kentucky company that is using modular conversion stations at stranded natural gas wells and pipeline gas locations to clean and compress raw gas inputs to provide electricity. During my final weeks, I worked on a presentation detailing the benefits and drawbacks of debt securitization for utilities' costs as an alternate to traditional rate base increases.

The project that I enjoyed the most involved recent EPA Clean Air Act regulations and their impact on coal-fired power plants operating within the state of Kentucky. I was able to attend testimonies by many of the impacted utilities at the Public Service Commission and before the legislative interim committee, as well as private conferences where the utilities detailed the future of coal. Through this, I realized the importance of the tradeoffs that must be made in order to abide by these regulations and what people must be prepared to sacrifice to protect the environment and public health. Everyone can appreciate an effort to protect our health through environmental regulation, but compliance with these regulations does come at a cost, and that cost generally falls upon the ratepayer. It was eye-opening to see firsthand how environmental issues such as these are not a matter of choosing sides, but of weighing tradeoffs.

Thank you again to the Charitable Foundation of the Energy Bar Association and the entire staff of the Kentucky Public Service Commission for making this amazing experience possible.

Holly Guest – Public Utility Commission of Texas

Due to the generosity of the CFEBA, I had the wonderful opportunity to work as a legal intern at the Public Utility Commission of Texas (TPUC) for eight weeks this summer. The best part about my internship was the introduction into such an important and unique area of law, energy, at an administrative agency.



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*The Charitable Foundation of the Energy Bar Association
Invites you to its Ninth Annual Fundraising Gala
Rays Of Hope*

December 1, 2011

5:30 to 7:30 p.m.

*In conjunction with the EBA Mid-Year Meeting at the
Grand Hyatt Washington
Washington, D.C.*

*Tickets \$100 - \$50 for government employees
(Purchase with Meeting Registration or Separately)*

202/223-5625

Sponsorships \$2,250

*Featuring Live Music, Silent Auction, Hors d'oeuvres, Open Bar
Proceeds contributed to energy-related charitable projects*



News from CFEBA *Continued*

At the end of my internship, I left with a much deeper understanding of public utility and telecommunications regulation in Texas, and will be able to take that new knowledge with me as I continue to pursue a legal career as an energy law attorney.

The TPUC staff was very gracious in allowing me great flexibility in my internship. I was able to work with each legal team within the department, including rulemaking and oversight and enforcement. I drafted several filings for Staff, such as a Statement of Position in response to a complaint against a retail electric provider (REP). I also drafted a Petition for Revocation filed against a REP that was not in compliance with procedural and substantive rules. My biggest projects were drafting Staff's Initial Brief and Staff's Reply Brief regarding another revocation petition and a REP's request for a rule waiver. Through projects like these, the TPUC Staff made it a point to give me substantive work that made me feel like a part of the TPUC team.

In addition to writing and research assignments, the TPUC legal staff introduced me to other divisions within the TPUC, such as wholesale markets, and I learned how those divisions work together with the legal staff. I was given the opportunity to visit the Electric Reliability Council of Texas (ERCOT) with a member of the wholesale market team on two occasions. During the first trip to ERCOT, I sat in on an ERCOT board meeting, and on my second visit, I was introduced to several ERCOT lawyers, sat in on a Technical Advisory Committee meeting, and also got a tour of the backup control room for Texas' electricity grid on site at ERCOT – the highlight of the trip.

While at the TPUC, I sat in on three open meetings and was able to meet all three Commissioners. One of the open meetings was particularly exciting because I had helped research an issue related to the constitutionality of delegating pole attachment ratemaking to the FCC, and it was unclear up until the meeting which way the Commission would rule on the issue. The TPUC Staff also invited me to every trial of the State Office of Administrative Hearings that I was available to attend, and made sure I was informed about the background of each case.

I could not have asked for a better internship experience at the TPUC. The attorneys treated me like a part of the team and included me on as many projects as possible. I am extremely appreciative of the CFEBA for this enlightening and challenging summer internship opportunity and grateful to the TPUC for welcoming me as a part of the group from day one. Everyone contributed to providing me with the most experience I could get out of my eight weeks at the Commission, and that experience will no doubt help me immensely in my journey to becoming an energy lawyer.

Gauri Phadnis - Connecticut Department of Energy and Environmental Protection Public Utility Regulatory Authority



Because of the CFEBA's generous donation, I was able to spend my summer interning in the Adjudications Division of the Connecticut Department of Energy and Environmental Protection Public Utility Regulatory Authority (formerly known as the Connecticut Department of Public Utility Control). It was a fascinating summer to spend at the Connecticut DEEP Public Utility Regulatory Authority because, as a result of recent legislation, the agency was undergoing a complete restructuring and a merger with the Department of Environmental Protection. I had the unique opportunity to experience first-hand the implementation of organizational and structural changes, as well as policy changes, at a state agency, pursuant to legislation. I also had the opportunity to participate in meetings regarding the merger of the two state agencies and help plan compliance with the legislation, a process during which I was able to visit the Department of Environmental Protection.

Through my internship, I learned about the energy industries themselves, in addition to the law governing the industries. I participated in teleconferences concerning various energy law matters, ranging from FERC's Order No. 1000 to the effects of the implementation of smart meter technology in Texas. As my final project for the summer, I prepared a handbook of Class III Renewable Portfolio Standard requirements in Connecticut, including definitions, qualifying criteria, and measurement and verification protocol for each qualifying Class III source. I also designed applications for Class I, II, and III Renewable Portfolio Standards. Further, I helped prepare a handbook for electric suppliers as to guidelines for certification.

I learned a great deal about the administrative process while working with the Adjudications Division attorneys. I was able to experience the quasi-judicial function of the agency by attending numerous Public Utility Regulatory Authority hearings. I gained a better understanding of the administrative and regulatory aspects of energy law through work researching state Public Utility Commission decisions on various issues set for hearing before the Public Utility Regulatory Commission.

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Energy Law Journal: Excerpts from Past Issues

Ten Years Ago

“Many telecommunications carriers require access to pole attachments or other rights-of-way that are now owned by local utilities in order to offer their service and compete in the industry. These companies are unlikely to accept preferences given to a competitor, in particular, a competitor affiliated with the utility. The extent to which carriers may demand nondiscriminatory access, as well as the impact of the pole attachment requirements on bringing about more competition, under the federal or states requirements, remain to be seen. Although the FCC has laid out rules, it has not considered every eventuality, and it has not determined how inconsistencies between its rules and the rules of certifying states are to be reconciled.”

Lawrence G. Acker, Rebecca L. Fowler, and Elizabeth B. Dickerson, *Effect of the Telecommunications Act of 1996 on Access to Electric and Gas Utilities' Rights-of-Way*, 22 ELJ 361, 378 (2001)

Twenty Years Ago

“The Trended Original Cost literature, to date, for the most part, contains more claims of the advantages of this method than the empirical evidence or theory can support. While it is true that the time path of tariff rates and rates of return are different under TOC and DOC [Depreciated Original Cost], it is not possible under either methodology to specify the time path of revenues or returns over the life of a project *a priori*. Nevertheless, either methodology can be adopted for ratemaking purposes. No evidence is currently available to determine which is the better method in terms of more closely replicating the competitive market. Indeed, the available evidence suggests that neither appears to have advantages over the other in this regard. Hence, the hypothesis that TOC better replicates the non-regulated, competitive economy must be rejected.”

Henry E. Kilpatrick, Jr., and Dennis H. Melvin, *The Trended vs. Depreciated Original Cost Controversy: How Real Are the Real Returns*, 12 ELJ 323, 336 (1991)

Thirty Years Ago

“[A] national long term energy policy is clearly warranted. . . . [N]ew incentives and energy policies must be developed at both the federal and state levels. While states can change the actions of their regulatory bodies, without a federal mandate, such action has been rare in the past. Further, tax incentives are clearly the sole province of the federal government. It remains to be seen as to which policies the administration will adopt and the actions which the states and the federal government will take, if any, in fostering appropriate long range energy policies.”

Edward L. Lublin, *The Future of the Department of Energy's Coal Conversion Program*, 2 ELJ 355, 368 (1981)



Young Lawyers Committee Holds a Panel on FERC Courtroom Tactics at the Washington College of Law of American University

Sean Tshikororo

On October 4, EBA's Young Lawyers Committee (YLC), in conjunction with the Energy Law Society (ELS) of American University's Washington College of Law (WCL), hosted "FERC Courtroom Tactics 101" at WCL. The event featured a prestigious speaker panel that included former FERC Chairman Joseph T. Kelliher, FERC ALJs Steven A. Glazer and Peter H. Young, Robert Fleishman of Covington & Burling LLP, and William S. Scherman of Skadden, Arps, Slate, Meagher & Flom LLP.

The event began with a panel in which the speakers discussed the ins and outs of FERC litigation. Second-year WCL student Ryan Gofus commented, "The most valuable part of the panel was listening to the ALJs give advice on how to argue before them. The three tips I will never forget are: know the facts inside and out; become truly passionate about your position; and always remember that Judges are people too." At the conclusion of the panel, the audience had the opportunity to attend a networking reception with the esteemed panelists in WCL's sixth floor lounge. John Monterubio, a second-year law student at WCL, said, "It was great to speak with the panelists at the networking event. Hearing about the panelists' backgrounds and about their daily activities as FERC ALJs definitely reinforced my desire to pursue a career in energy law after graduation."

"FERC Courtroom Tactics 101" was the first event the EBA has coordinated with WCL's Energy Law Society. John Wheatley, ELS Co-President and a third-year WCL student, remarked, "we were honored that the EBA chose to hold this event on our campus. It was a valuable experience for the students and the young attorneys who were lucky enough to attend, and it helped increase awareness of WCL's commitment to energy law, which includes offering one of the nation's broadest selections of energy law courses." The event was apparently not just a benefit for the audience, as Judge Young mentioned that he enjoyed hearing what the attorneys on the panel perceived to be the keys to successfully litigating before a FERC ALJ such as himself.



News from CFEBA *Continued*

I would like to thank the CFEBA for enabling my summer experience. The funding the CFEBA provided allowed me to explore my interest in energy law. Through my summer experience, I was able to fully realize my desire to practice energy law and I have the CFEBA to thank for making the experience possible.

Lauren Reilly – Federal Energy Regulatory Commission



The Charitable Foundation of the Energy Bar Association (CFEBA) provided me with a generous scholarship to work for ten weeks at the Federal Energy Regulatory Commission (FERC or Commission) in Washington, DC. I worked in the Office of the General Counsel, Energy Markets Division to conduct research and legal analysis on a variety of energy issues. My big writing assignment this summer was to write an objective memorandum on a breach of contract claim between two entities that file with the Commission. This project helped me understand the different filings submitted to the Commission.

Other research and writing projects I completed over the course of the summer involved the following subjects: transmission agreements, whether transmission practices are unduly discriminatory, tariff revisions, and notice requirements under the Administrative Procedure Act (APA). Additionally, along with conducting legal analysis, I drafted uncontested settlement orders for Commissioner approval. One of the most exciting projects I worked on was editing and checking the citations of Order No. 1000, involving transmission planning and cost allocation requirements, that the Commissioners approved at the recent July Commissioner's meeting.

The most valuable experiences in my internship were the discussions I had with attorneys and other Commission staff about the research I conducted and legal conclusions I came to. They provided me invaluable feedback and my legal research and writing skills have improved immensely. The attorneys I worked with were supportive and wanted to make my internship a rewarding experience. Additionally, I gained exposure to other Commission Staff and their duties in different offices, including the Office of Energy Policy and Innovation and the Office of Energy Market Regulation.

Besides these projects I worked on throughout the summer, I also had the opportunity to attend various staff meetings about my projects and other issues before the Commission. I listened to the staff discussing issues surrounding various orders, like Order No. 1000, from the earlier stages to the final Commissioner's meetings.

I am so grateful for all of the individuals who made my internship such an intellectually stimulating and positive experience. It has been an honor and a privilege to work with everyone at the Commission. I look forward to taking what I have learned this summer back to my final year of law school and as I continue on into the energy law field after graduation. Finally, I would like to thank the Charitable Foundation of the Energy Bar Association for making this amazing summer internship possible.

Interstate Natural Gas Pipeline Ratemaking Course

Susan A. Olenchuk

Twice a year, EBA cosponsors a five-day class on interstate natural gas pipeline ratemaking. The class, which is offered by the New Mexico State University's Center for Public Utilities, is taught in a lecture and hands-on workshop format and is designed for anyone (attorneys, pipeline employees, regulators) who desires an understanding of basic pipeline ratemaking principles. Instructors include a representative from FERC's Office of Administrative Litigation, rate analysts from interstate pipeline companies, and several EBA members. The Interstate Natural Gas Association of America also is a co-sponsor. The class was held on October 23-28, 2011 in Albuquerque, New Mexico. A brochure is posted on EBA's website.



President's Message

Continued

November 30, 2011. Other upcoming activities include a charitable service project on November 5th, brown bag luncheons on NERC compliance issues on November 8th and corporate compliance issues on November 10th.

Recent developments within the Association, include the search for a new Executive Director for the Association. The job description is included herein. Additionally, the Association is exploring expanding our presence in law schools by evaluating the creation of student chapters. The Association is looking to expand our web presence by creating more interactive opportunities, including creating a resource for continuing legal education credits based on the programs offered by the Association. The Southern Chapter held its annual meeting on October 17, and I thank them for an excellent meeting and their great hospitality.

One recent development that we ask each of our members to assist in turning around is membership attrition. As a voluntary bar association, we strongly rely on members to get the word out about renewing and joining the Association. Hopefully, each of you received your most recent Energy Bar Association Directory. We ask that each of you reach out to a colleague and invite them into (or back into) the Association, possibly by inviting them to participate at the Mid-Year Meeting. Although the Association is enriched by the members we serve, increasing total membership remains an objective that can only be achieved by participation of all of the Association members.

We look forward to seeing you on December 1, 2011 at the Mid-Year Meeting!

Derek A. Dyson
EBA President



Southern Chapter Meeting Held in Conjunction with the Annual Meeting of the Southern States Energy Board and the Governor's Energy Conference

James P. Guy

Approximately 25 members and guests of the Southern Chapter met on October 17, 2011 at the Greater Richmond Convention Center for breakfast and a presentation by energy industry analyst Jim von Riesenmann of UBS. Mr. von Riesenmann described the conditions and circumstances that can attract market capital to the energy sector, or discourage it. Among the attendees were EBA President Derek Dyson and Virginia Deputy Secretary for Natural Resources Maureen Matsen. The Deputy Secretary, who also serves as Governor Bob McDonnell's Senior Energy Policy Advisor, welcomed the Chapter and expressed appreciation that the meeting was scheduled to coincide with the Annual Meeting of the Southern States Energy Board and with Governor McDonnell's Conference on Energy. EBA President Derek Dyson welcomed Chapter members and guests, and described some of the many benefits of EBA membership. Southern Chapter Board member Louis Monacell introduced the speaker, and Chapter President Jim Guy convened and coordinated the meeting. The meeting was sponsored by LeClairRyan, Christian & Barton, L.L.P., Stoll Keenon Ogden PLLC, and Moore & Van Allen, PLLC



EBA President Derek Dyson welcomes EBA members and guests at the Southern Chapter Meeting.



Interview with Ted Gerarden *continued*

Serendipity: Moving Inexorably to Heading FERC's Trial Staff

Right from the start, Ted Gerarden's legal career has been impressive. He clerked for Judge Oliver Gasch on the United States District Court for the District of Columbia as a newly minted graduate from Georgetown University Law Center. He next became a prosecutor for the District of Columbia Corporation Counsel. He then joined the Department of Energy when it first came into being in 1977. There he worked on major investigations of multi-million dollar oil allocation and remedial order cases – again a prosecutorial function. He dealt directly with top executives of major oil companies, such as Gulf, and senior partners of New York law firms.

In 1980, Mr. Gerarden entered private practice in the boutique energy firm, McGee & Ketcham. (One of your reporters got to know him well there, as his law firm, Cullen and Dykman, was located in the same building, and he made frequent use of the McGee & Ketcham law library.) This is when Mr. Gerarden and FERC gas hearings first came together. These were heady days in the gas industry with major regulatory changes under way at FERC, and he was in the thick of it. Mr. Gerarden took his gas practice to Donelon Cleary Wood & Maser when McGee & Ketcham closed its doors. (Astonishingly, he and your reporter, who had joined Bruder, Gentile & Marcoux, both ended up moving to the same building.) Mr. Gerarden won some impressive cases for TransCanada in Great Lakes proceedings, including appeals, but he saw that restructuring was leading to a dearth of such litigation down the road.

As the FERC gas cases started to dry up, with triennial rate reviews no longer

required, Mr. Gerarden made an interesting transition in taking his expertise to the Postal Rate Commission as the Director of the Office of the Consumer Advocate. That role actually very much resembles the one he has now in that he was responsible for representing the public interest. Unlike FERC-regulated entities, however, the Postal Rate Commission had just one regulated entity with a \$17 billion cost of service. He called the detail involved in setting postal service rates “mindboggling,” and on a



much larger scale than FERC pipeline rate cases. His primary constituencies were the predominantly residential users of first class mail, as business and bulk mail users had trade associations and retained counsel to

Sifting through the detail of a \$17 billion dollar cost of service entity was “mindboggling.”

protect their interests.

While in that post and upon exiting his position there, Mr. Gerarden promoted different approaches to setting rates, and he wrote publicly on various reforms that he espoused at the Postal Rate Commission. Those interested in this field can Google some of Mr. Gerarden's innovative written suggestions, as we did.

Next stop for Mr. Gerarden was his triumphal return to FERC, where he has remained. The Office of Market and Oversight Investigations, now the Office of Enforcement, had just been created, and he jumped at the chance to be involved in this new enforcement endeavor that then-Chairman Pat Wood III initiated. He helped to build the Office and authored the first Enforcement Policy Statement. He was also instrumental in the formulation of the Market Manipulation Rule. Mr. Gerarden also handled approximately 30 investigations that resulted in settlements approved by the Commission with more the \$60 million of civil penalties and \$12 million in disgorgement of unjust profits. (The Enforcement Staff tries the few cases in which investigations do not result in settlements and the Commission determines that action is required.) Mr. Gerarden's eight years performing these important policy, enforcement, and investigation roles ended earlier this year when he was elevated to be FERC's No. 1 Trial Lawyer.

Before 1999, the FERC litigation lawyers were dispersed in different OGC offices while their expert witnesses were separately employed in non-lawyer technical offices. This all changed when OAL was created that year to have all the Trial Staff, lawyers and non-lawyers alike, teamed together in a single Office. In 2001, OAL was broken up again, with the lawyers going back to OGC, and the non-lawyers in a separate Office of Markets, Tariffs, and Rates. That formulation did not seem to work as well as what had been in place, according to Mr. Gerarden, and so everything was put back in 2003 as an independent Office. In 2006, a Dispute Resolution Office left OGC and became part of OAL, as DRS.

This mega-Office needs to be headed by someone of exceptional ability, and that

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Interview with Ted Gerarden *continued*

explains Mr. Gerarden having been hand-picked by Chairman Jon Wellinghoff. His “favorite” activity in private practice had been trying cases at FERC, and now he does that full time as the overseer of each and every (non-Enforcement)FERC Staffer engaged in litigation either as a lawyer or as a witness (including some folks who he tried cases against years ago). Not surprisingly, he has not been particularly surprised by anything he has come across on this new job. The biggest drawback for this trial lawyer is the administrative work that he has to handle as the head of such a large organization. “I would like to spend more time working with the people and on the cases,” he laments. He had liked mentoring young lawyers at the Office of Enforcement, and regrets not having the time to do that with the half dozen young lawyers at OAL who are teamed up with seasoned Staffers. Despite these unavoidable paperwork demands, it certainly appears that Chairman Wellinghoff has come up with the perfect match for Mr. Gerarden to have OAL and for OAL to have Mr. Gerarden.

Life at OAL: Doing the People’s Business

Director Gerarden finds the cases being set for hearing to be fewer in number but more complex. The predominant case load consists of electric cases, another change from the past when natural gas pipeline cases were more frequently litigated. Of the 117 active cases in which OAL was involved last year, 76 were electric, 25 were gas, 15 were oil, and 1 was hydro.

Industry analysts and other technical expert witnesses outnumber the lawyers on the OAL Staff. Cost of service, cost allocation, rate design, cost of capital, return on equity, depreciation, competition analysis, engineering analysis, particularly involving generation interconnections, and accounting are all topics that OAL routinely handles. These subject matter experts specialize in certain of these areas that usually can be applied to either electric or gas cases. The lawyers are more industry focused, although not exclusively, and work with their experts on discovery, settlement negotiations (including the preparation of “top sheets” in gas rate cases), preparation of testimony, cross-examination at hearing, and in post-hearing briefing both to the Presiding Administrative Law Judge and the Commission. Many of them are very good, long-term attorneys, Mr. Gerarden explains, because they prefer the hearing work that OAL offers.

“The Commission has a very clear preference for settlements,” Mr. Gerarden pointed out. He stated that most cases do result in full or partial settlements. He observed that Staff is very active in settlement negotiations, and often takes the initiative in bringing parties toward

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Sounding Out Ted Gerarden, Bicyclist

How would you spend any spare time? Go on more bike rides. (He bikes to work from the suburbs.)

Any bedside reading material? Biographies, historical novels (including the entire Patrick O’Brian series on the British/Napoleonic France naval battles), murder mysteries, and Zane Grey westerns.

Favorite motto? “Keep the rubber side down.” (What you say to a biker to avoid a crash.)

Favorite sound? My children’s voices.

Least favorite sound? Car horn just before it hits me. (Still thinking like a biker, a recurring theme here.)

What turns you on? Being outdoors, deep in the back country.

What turns you off? Negative people.

Dream Occupation? Back Country Ranger.

What most to be remembered for professionally? As having been a good mentor to young lawyers, and a fair boss who had high expectations.

Any advice to young lawyers? “Branch out while you are young. Try new things. That applies not only in law but in life. The more things you attempt in life, the more you will find things that are meaningful to you and make you happy. The corollary to that is: Take some time off.”

Where were you when the Earthquake hit FERC and the rest of the northeast? Surviving a different earthquake while on vacation in Colorado. (He shared with us the extended-family-trip photos, and it was a spectacular biking adventure.)



Interview with Ted Gerarden *continued*

compromise solutions, particularly with the presentation of top sheets analyzing the cost of service, ROE, throughput, and other aspects of a pipeline rate filing. Over the last three years, these settlements have yielded \$2.2 billion in refunds and cost savings in rates going forward.

When cases come into OAL, all of the managers discuss who among the experts and lawyers are best to be assigned from the standpoint of the issues presented, time availability, familiarity with the applicant from prior proceedings, as well as the possible benefits of a “fresh set of eyes,” so that Mr. Gerarden describes it as a “community” exercise of case assignment with no rigid procedure. In terms of the positions taken by OAL Staff, he stresses that the starting point is to determine if the filing is consistent with Commission policy and what particular concerns have been raised by the Commission itself in the order setting the case for hearing and/or settlement proceedings. The various accounts and costs are examined to determine if they meet just and reasonable standards in Staff’s view, with those views of the customers taken into consideration but not dispositive of the Staff’s independent conclusions. For example, he noted that there are times when OAL will be in agreement with the rate applicant on an issue rather than with a customer.

There is no contact between OAL and Advisory Staff once a hearing order was been issued based on the Commission’s *ex parte* rules, he explains (which we reporters assume is why OAL is outside of the General Counsel’s Office in the first place). Indeed, if a case is appealed, OAL Staff does not communicate with the Solicitor’s Office Staff about the case either, he explained, because of the possibility of a remand back to FERC for further evidentiary hearings. He contrasted this with Trial Staff properly having conversations with individual parties in a case apart from those that take place among all parties in a FERC Hearing Room. He knows that the applicant has usually had conversations with customers about the case before the filing is submitted, so that OAL will be coming into the proceedings after others have staked out positions. He sees Staff conversations with various parties as constructive in formulating settlement and litigation positions with knowledge of the full range of perspectives of others active in the case.

It is this topic of OAL interaction with those of us in the EBA who represent clients in these matters set for settlement or hearing that we next asked the good Director to discuss.

High Regard for Energy Practitioners

We particularly wanted to ask Mr. Gerarden how we, the EBA members who comprise most practitioners before FERC, are faring because he is able to gauge the energy bar as it is now and how, if at all, it has changed over the decades that he has been one of our members. The bad news is that he has found a little more of the “scorched earth, contentious” kind of practice intended to deplete the opponent’s resources while resisting providing discovery going on now at FERC than in past periods. He does not pretend to know why this is the case, other than that there appears to be less civility in other areas of society as well, as we all see in the area of government and politics. And he surmised that the clients may be directing their attorneys to “play hard ball” in the mistaken impression that things should be done at FERC as they see in other places. For whatever the reason, he finds it “frustrating” when lawyers try to “gum up resources” by propounding enormous amounts of data requests that serve no real purpose in resolving issues. The good news is that this does not happened often and, in fact, “the Energy Bar is one of the better bars in my experience in terms of high level of practice.”

“It is always a pleasure to be litigating against good lawyers,” Mr. Gerarden maintains. In fact, “it is a lot easier when lawyers are well organized, focused on the issues, do a good job of responding to discovery, and target their discovery to us by focusing on what the issues are.” Thinking back to the long-term energy practitioners with whom he has come into contact over his lengthy career, Mr. Gerarden observed that they were “gentlemen and gentlewomen first and top level practitioners second.” He found this to be a “nice combination by folks who treated people well.” He also finds that working towards getting all the facts presented is the most effective way of guiding the Administrative Law Judge through reasoned briefing, and that this creates a better record for the appellate courts as well. “By and large, that is the way energy lawyers practice before the Commission,” he tells us. So we have reason to be pleased, but maybe not ecstatic, about our collective performance.

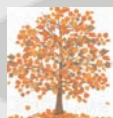
“The Commission has a very clear preference for settlements.”

Those approved over the last three years have benefited customers by \$2.2 billion.



“The Energy Bar is one of the better bars in my experience in terms of high level of practice.”

continued on page 13



Interview with Ted Gerarden continued

Mr. Gerarden also had the opportunity over the years to have worked with some of the best consultants and expert witnesses in the energy field. He singled out as luminaries from the past who are no longer among those actively engaged in FERC matters, Charlie Daley, Ben Shiffer, and Hank Zinder, each of whom he described as “brilliant” and from whom he learned a great deal. These names are well known to those of us of Mr. Gerarden’s generation as among the leading lights in their field during their time.

Alternative Dispute Resolution: Give it a Try!

By statute, every executive branch agency is required to have a designated ADR Official, Mr. Gerarden informed us. Rick Miles had been that official as Mr. Gerarden’s immediate predecessor. The ADR Staff, housed within the Dispute Resolution Service, has “an entirely different function from the rest of OAL,” Mr. Gerarden continued. Rather than take positions on issues, the ADR Office serves as a mediator and facilitator. They can “provide guidance to parties on how best to choose a path for negotiations, how to structure discussions; they can provide training in negotiation techniques and discussions, and facilitation techniques.”

Any party can contact DRS, although Mr. Gerarden notes that usually all parties agree in advance to choose this route before anyone approaches the Office to request assistance. Also, the Commission can direct the parties to work through DRS. These Staffers also operate the Help Line to assist landowners; and they reach out to pipelines to provide education and assistance on how to avoid conflicts with landowners. Environmental specialists within DRS are often involved in these land matters. Last year, DRS had a 93% success rate in resolving one or more issues in the cases that they were asked to be involved with -- an enviable record indeed.

BIG Issues: Gas Lawyers, Wake up! Something New for Electric Lawyers, Too!

And now, Dear Reader, we come to the part for which you have been anxiously awaiting. We asked Mr. Trial Lawyer to tell us what to look for as the next big hearing issues at FERC. Here is what he told us:

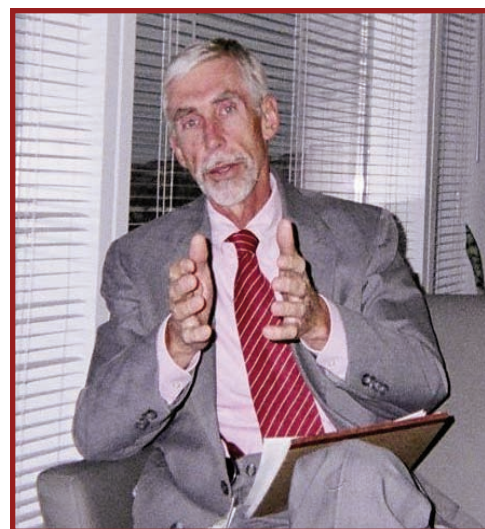
“One of the big things we see coming as a growing issue is pipeline utilization, as shale gas is changing flow patterns. It is creating very significant issues as to facilities that are no longer being used in the ways they had been for many years.”

Among the issues posed by this change in asset function, he told us, are “very significant depreciation issues.” The appropriate depreciation rate for facilities is being looked at anew because the same facility has taken on a new purpose in many cases, he explained. “A new gas supply could extend the life of a facility,” he declared. “At

the same time, you could have a change in flow patterns that could make another facility no longer as useful.” So you can have service lives of discrete lines changed in opposite directions on the same pipeline. He describes the depreciation people as being “very pressed right now” by this whole new area of perplexity in what has always been a highly specialized subject matter that intervenors have by and large not had the resources to devote, thus increasing the responsibility for FERC Technical Staff to take the lead. Sounds to us like some veteran gas attorneys will also need to holster up and get back on their horses for return command performances at FERC!

On the electric side, Mr. Gerarden identified “nailing down all the elements of a formula rate” as a tremendously complex matter under which “interesting accounting issues are arising.” As he explains, utilities “take the dollars” out of an account and flow them through the formula, so that the composition of the various accounts determines how the formula matrix is populated each year. This is creating a need for accountants of the highest caliber to make sure that rates are being properly constituted out of appropriate accounts. Essentially, the move from stated rates to formula rates for wholesale electric transmission has carried with it a new responsibility for FERC’s Accounting Staff to consider the impact on rates of accounting determinations. Fodder for practitioners!

It was, therefore, with much gratitude for this heads-up information that we are glad to be able to share with you, Dear Reader, that we took our leave of the highly esteemed Ted Gerarden with thoughts of depreciation and accounting, of all things, dancing in our heads.



Upcoming Events

Mid-Year Meeting

December 1, 2011
Grand Hyatt Washington
Washington, D.C.

Charitable Foundation Eighth Annual Fundraising Gala, Rays of Hope

December 1, 2011
Grand Hyatt Washington
Washington, D.C.

A Primer on Legal Practice and Administrative Procedure – Unlocking the Mysteries: Everything You Didn't Know About FERC Practice

December 2, 2011
Grand Hyatt Washington
Washington, D.C.

Eleventh Annual Western Chapter Meeting

February 24, 2012
Hyatt Regency San Francisco
San Francisco, CA

Fifteenth Annual Midwest Chapter Energy Conference

March 13, 2012
Des Moines Marriott Downtown
Des Moines, IA

For more information on any of these events, please contact Michele Duehring at 202.223.5625 or michele@eba-net.org.

Job Notice for EBA Executive Director

EBA is seeking candidates to fill the position of Executive Director upon Lorna's retirement in spring 2012. EBA has retained Tuft & Associates to assist in the search process. The Executive Director Position Profile is posted on EBA's Job Bank (www.eba-net.org). Persons interested in being considered for the position must submit a resume and cover letter to Tuft & Associates, ATTN: Carole Badger, JD, FASAE, CAE, czb@sprynet.com. Do not submit resumes and cover letter to the EBA administrative office.

ABOUT THE ENERGY BAR ASSOCIATION: EBA is a non-profit voluntary association of attorneys, non-attorney professionals and law students whose mission is to enhance the professional excellence and ethical integrity of its members in the practice, administration, and development of energy laws, regulations and policies. Established in 1946 as the Federal Power Bar Association, the Association generally was focused on those lawyers practicing energy regulatory law at the federal level. In 1977, the organization changed its name to the Federal Energy Bar Association to reflect the name change of the Federal Energy Regulatory Commission. Today, the Energy Bar Association is an international, non-profit association of attorneys, non-attorney professionals and law students active in all areas of energy law. It has over 2600 members, throughout the United States, Canada and Internationally with six formal chapters in Houston, New Orleans, Midwest, Southern, Western and Northeast regions of the U.S.

DIVERSITY POLICY STATEMENT: The Energy Bar Association is committed to the goals of fostering an inclusive and diverse membership and increasing diversity across all levels of the Association, so as to reflect the diversity of the energy industry and the Nation as a whole. Attorneys, non-attorney professionals in the energy field and law students are welcome to join our ranks regardless of race, creed, color, gender, ethnic origin, religion, sexual preference, age, or physical disability and are encouraged to become active participants in the Association's activities.

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