ENERGY LAW JOURNAL

Volume 26, No. 1  2005

CONTENTS

Editor's Page ........................................................................................................ x
In Memoriam: Richard A. Solomon ..................................................................... xi
In Memoriam: Radford L. Schantz ..................................................................... xii

ARTICLES

Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission ................................................................. 1
   Hon. Joseph T. Kelliher

From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons ................................................................. 35
   Hon. Richard D. Cudahy and William D. Henderson

 Tradable Green Certificate Systems in the E.U .................................................... 111
   Giovanna Golini

Liquefied Natural Gas Import Terminals: Jurisdiction over Siting, Construction, and Operation in the Context of Commerce Clause Jurisprudence ........................................................................ 135
   Monica Berry

NOTE

If It's Worth a Dam, It's "Navigable Waters": A Proposed Revision of Section 3(8) of the FPA Derived from Decisions Followed in FPL Energy Maine Hydro LLC v. FERC ................................................................ 179

COMMENT

The Tangled Web: Regulation, Interstate Pipeline Companies, And Due Process Rights of Property Owners ................................................................. 191
BOOK REVIEW

Crude Awakenings: Global Oil Security and American Foreign Policy
Reviewed by Jonathan D. Schneider

SUBMITTED COMMITTEE REPORTS

Electric Utility Regulation
Legislation and Regulatory Reform
Natural Gas Regulation
The Charitable Foundation of the Energy Bar Association

Dedicated to charitable activities, including energy-related charitable projects and other community service endeavors, through financial contributions and volunteer efforts of members of the Energy Bar Association and others.

We welcome your contributions and solicit your participation.

Charitable Foundation of the Energy Bar Association
2175 K Street, NW
Washington, D.C. 20037-1828
202/223-5625

www.eba-net.org

And we gratefully acknowledge those EBA members and others who have so generously contributed in the past.
The Energy Bar Association is an international, non-profit association of attorneys and non-attorney professionals, active in all areas of energy law. Founded in 1946 as the Federal Power Bar Association, the Association currently has 2200 members. The Association’s voluntary membership is comprised of government, corporate, and private attorneys, as well as non-attorney professionals from across the globe, and includes law students interested in energy law. The mission of the Association is “to enhance the professional competence of those who practice and administer energy law.” In addition to publishing the Energy Law Journal, the Association organizes and sponsors a number of activities, including a continuing legal education program in the fall of each year, as well as a program held in conjunction with the annual meeting in the spring that focuses on issues of current interest. The Association also sponsors committees that monitor and report to the membership developments of interest. Complete membership and subscription information can be obtained from the Association at 2175 K Street, N.W. Suite 600, Washington D.C. 20037, or by calling (202) 223-5625.

The Energy Law Journal is published two times a year. Articles by members and non-members of the Association are welcomed. All manuscripts should be of substantial length, not previously published, dealing with the energy industry, and follow the seventeenth edition of The Bluebook: A Uniform System of Citation. A brief biographical statement should be included. All manuscripts should be sent to Mr. Clinton Vince, Editor-in-Chief, Sullivan & Worcester LLP, 1666 K Street, N.W., Suite 700, Washington, D.C. 20006. Only manuscripts submitted exclusively to the Energy Law Journal will be considered for publication. The opinions expressed in the published material are those of the writers and are not intended as expressions of views of the Energy Bar Association. Inquiries about advertising in the Energy Law Journal should be addressed to Mr. Andrew S. Katz at (202) 508-0903. The Energy Law Journal is indexed in the INDEX TO LEGAL PERIODICALS, The CURRENT LAW INDEX, WESTLAW, and LEXIS services.

By submitting materials for publication in the Energy Law Journal, you agree that any such materials including articles, notes, comments, book reviews, and committee reports that are published in the Journal are “works made for hire,” and you assign all rights in and to those written works to the Energy Bar Association.

To be cited as: 26 ENERGY L.J. _____ (2005). © Copyright 2005 by the Energy Bar Association

ISSN 0270-9163
FOUNDATION OF THE ENERGY LAW JOURNAL

OFFICERS

Richard Meyer  
*President*

Earle H. O'Donnell  
*Vice-President*

Regina Y. Speed-Bost  
*Secretary*

Channing D. Strother, Jr.  
*Treasurer*

BOARD OF DIRECTORS

Frederic G. Berner, Jr. (ex officio)  
A. Karen Hill  
Stephen L. Huntoon (ex officio)  
Andrew S. Katz (ex officio)  
Jennifer L. Key  
Peter E. Meier

Richard Meyer  
Elisabeth R. Myers  
Earle H. O'Donnell  
Richard J. Pierce, Jr.  
Laura M. Schepis  
Regina Y. Speed-Bost  
Channing D. Strother, Jr.

Clinton A. Vince (ex officio)
EDITOR'S PAGE

Oscar Wilde once wrote that in matters of great importance, style rather than sincerity, is the essential thing. I have long felt just the opposite is true—that sincerity is what counts. Since assuming the role of Editor-in-Chief of the Energy Law Journal, I have only encountered sincerity—at every level—from the extraordinary Editorial Board that former Editor-in-Chief, Bill Mogel, assembled, to the student editors at Tulsa, to the authors who grace our pages and, of course, from our patron, the Foundation of the Energy Law Journal, presided over by the able Richard Meyer.

But, just in case Oscar Wilde was right about style, we have decided to give the Journal a “face lift,” after twenty-five years. We hope you will enjoy the new cover which now bears the official colors of the Energy Bar Association and a new “look.”

In terms of content, we are pleased to declare that the latest edition of the Journal is as strong as any we have published. FERC Commissioner Joe Kelliher tells us where the FERC, with support from Congress, should be heading on the subject of competitive markets and the daunting issues of market manipulation and market power. Judge Cudahy of the U.S. Courts of Appeals for the Seventh Circuit has teamed with Professor William Henderson to produce an extraordinarily comprehensive and insightful analysis of the “Rise and Fall of Two Energy Icons”—Insull and Enron. Giovanna Golini adds international perspective in focusing on “Tradable Green Certificate Systems in the E.U.” Monica Berry examines the “hot” topic of Liquified Natural Gas and, in particular, jurisdiction over siting, construction, and operation in the context of the commerce clause.

This edition also features reports of the committees on electric utility regulation, legislation and regulatory reform, and natural gas regulation that are as timely as they are informative. Finally, Jonathan Schneider discusses the complexities of Steven Yetiv’s new book: “Crude Awakenings: Global Oil Security and American Foreign Policy.” Happy reading!

Clinton Vince
Editor-in-Chief
IN MEMORIAM

Richard A. Solomon, who brilliantly served the public in a number of capacities, died on January 23, 2005.

Dick, born in New York in 1917, graduated from Harvard in 1939, and received his law degree from Yale in 1943. He became a JAG Officer serving in the China-Burma-India theater during World War II and was a prosecutor of Japanese war criminals after the war. When he returned to civilian life, Dick joined the Federal Communications Commission where he held a variety of positions from 1947 until 1959. Dick’s next stop was as the Deputy Chief, and later Chief, of the Appellate Section of the Anti-Trust Division at the Justice Department.

Dick’s energy law career began in 1962 when he was appointed General Counsel of the Federal Power Commission. During his seven-year tenure as General Counsel, Dick used his considerable appellate skills to defend the Federal Power Commission’s major policy endeavors: of improving the reliability of the electricity grid and developing area and national rates for sales of natural gas. While at the Commission, Dick was honored as a recipient of the Tom C. Clark Award, the highest award for a federal government attorney, from the Federal Bar Association.

In 1969, Dick joined the law firm of Wilner & Scheiner where he turned to representing state and local interests, primarily the Public Service Commission of the State of New York and other consumer interests in a wide range of cases before the Federal Energy Regulatory Commission. Dick retired in 1994 from the law firm of Morrison & Hecker. Throughout his fifty-year legal career, Dick was known for his skillful appellate advocacy, having argued a dozen cases before the Supreme Court and innumerable times before the Circuit Courts. Dick served as President of the Energy Bar Association in 1985–86.

Dick freely shared his incredible legal skills with many lawyers whom he mentored throughout his career. While he was a fierce advocate, he never took himself too seriously and had a wonderful sense of humor. He coupled those qualities in his self-created persona as an “absent minded professor.” Who can forget hearing his voice from the back of a hearing room asking, “What case is this?” and then watching him ask the toughest cross questions going to the heart of the case?
IN MEMORIAM

Radford Lawrence Schantz, age seventy-nine, who retired in 1989 as President of Foster Associates, an economic consulting firm specializing in energy and regulated utilities, died January 20, 2005, at his home in Bethesda, Maryland. He had lung cancer. Mr. Schantz was a founding member of Foster Associates in the mid-1950s. After his retirement, he remained active in community affairs and continued to play the clarinet.

He was born in Gainesville, Georgia, and spent his high school years in Lowville, New York. Mr. Schantz served in the Navy in the Pacific during World War II and participated in the Battle of Leyte Gulf.

He was a 1949 electrical engineering graduate of Syracuse University, and in 1952 he received a master's degree in business administration from New York University. Early in his career, Mr. Schantz did electrical engineering work for Consolidated Edison Co. in New York and taught economics at NYU and Harvard University.

He was a member of River Road Unitarian Church in Bethesda as well as the Bethesda-Chevy Chase YMCA, where he also did volunteer work and developed the seniors' tennis league. Survivors include his wife of thirty-eight years, Erika Bading Schantz of Bethesda; two children from his first marriage, Radford Schantz Jr. of Arlington, Virginia, and Douglas N. Schantz of Houston, Texas; two children from his second marriage, Susanne E. Schantz of London, England, and Thomas B. Schantz of Alexandria, Virginia; two brothers; and six grandchildren.

Mr. Schantz led Foster Associates during a period of profound changes in the energy industry and government regulation. He testified extensively concerning energy and regulatory policy. His wisdom and industry made him a giant in the field. He was a friend and mentor to many of us.
Foundation of the Energy Law Journal

CONTRIBUTORS*

Corporate/Law Firm

**Sustaining**
Bruder, Gentile & Marcoux, L.L.P.

**Sponsors**

Arizona Electric Power Cooperative, Inc.
The Brattle Group
Brown, Olson & Wilson, P.C.
Brunenkant & Cross, LLP
Burlington Resources Oil & Gas Co.
Edwards & Associates
Energy & Mineral Law Foundation

Energy Business, Inc.
Gorak & Bay, L.L.C.
Griggs & Alder, P.C.
R. Erick Johnson, P.C
Lukens Energy Group
Middle Tennessee Natural Gas Utility District
National Rural Electric Cooperative Association
NW Natural

**Contributors**

Arizona Electric Power Cooperative, Inc.
The Brattle Group
Brown, Olson & Wilson, P.C.
Brunenkant & Cross, LLP
Burlington Resources Oil & Gas Co.
Edwards & Associates
Energy & Mineral Law Foundation

Energy Business, Inc.
Gorak & Bay, L.L.C.
Griggs & Alder, P.C.
R. Erick Johnson, P.C
Lukens Energy Group
Middle Tennessee Natural Gas Utility District
National Rural Electric Cooperative Association
NW Natural

**Individual**

**Sustaining**
Stephen A. Herman
Kenneth G. Hurwitz

**Sponsors**
John F. Harrington
William M. Lange

**Contributors**

Ernest B. Abbott
Janice A. Alperin
Allan W. Anderson, Jr.
George A. Avery
James H. Bailey
Bernays T. Barclay
Harry E. Barsh, Jr.
Isaac D. Benkin
William O. Blome

**Friends**

Richard D. Avil, Jr.
James F. Bendernagel, Jr.
Thomas F. Brosnan
G. Mark Cook
Roger B. Cooper
Donald K. Dankner
Robert S. Fleishman
Paul W. Fox
Elisa J. Grammer
Freddi L. Greenberg
Joel L. Greene
R. David Hendrickson
Andrea R. Hilliard
Thomas E. Hirsch, III

James J. Hoecker
Donald A. Kaplan
Robert C. McDiarmid
Randolph Q. McManus
A. Hewitt Rose
Jane I. Ryan
Donald F. Santa, Jr.
Frank P. Saponaro, Jr.
William S. Scherman
Richard G. Smead
David R. Stevenson
Mary K. Vasile
Catherine Carl Wakelyn
Mark C. Williams

Robert W. Byrne
Stuart A. Caplan
Carol Caul
Wendell Cauley
James M. Chalker
John H. Conway
Richard D. Cudahy
Anthony C. DeCusatis
William D. DeGrandis
Kimberly H. Despeaux
Romulo L. Diaz, Jr.
Clark Evans Downs
Kenneth B. Driver
M. Douglas Dunn
Michael Dworkin
N. Beth Emery
Leslie B. Enoch, II
Jonathan S. Epstein
Peter G. Esposito
Joseph H. Fagan
Diane J. Fellman
Philip A. Fleming
Cheryl M. Foley
Frances E. Francis
Michael J. Fremuth
Eric T. Fresch
Joseph F. Furay
Jeffrey L. Futter
Linda S. Gilbert
Marsha L. Gransee
Richard C. Green
Cheryl K. Hachman
Michael E. Haddad
Walter R. Hall, II
Roberta Lee Halladay
Lynn N. Hargis
Roland V. Harris
Joseph R. Harrisoe
Mark R. Haskell
Steven E. Hellman
John C. Herbert
Patrick J. Hester
Marcia C. Hoeks
Stephen L. Huntoon
Ernest J. Jerardi
Timothy P. Ingram
Daniel M. Ives
James P. Johnson
Thomas G. Johnson
Andrew W. Johnson
Andrew S. Katz
Edward D. Kee
Robert W. Kehres
Don L. Keskey
Michael L. Kessler
Bruce F. Kiely
Martin V. Kirkwood
Richard J. Kruse
George R. Laidlaw
Julia A. Lake
Stephen R. Larson
William S. Lavarco
Kelli Leaf
Dean H. Lefler
Jason F. Leif
Frank Lipson
Jay P. Lukens
William J. Madden, Jr.
Michael G. Maloney
Michael R. Mangham
Philip M. Marston
John P. Mathis
Catherine P. McCarthy
Michael N. McCarty
John K. McDonald
Becky McGee
Brian J. McManus
Colette B. Mehle
Richard M. Merriman
Alexandra I. Metzner
Richard Meyer
Rebecca J. Michael
Julia Moore
H. Liza Moses
Andrew P. Mosier, Jr.
Robert J. Musial
Elisabeth R. Myers
C.M. (Mike) Naeye
Robert A. Nelson, Jr.
James P. O'Brien
Earle H. O'Donnell
R.Y. Patterson, Jr.
William H. Penniman
Marjorie R. Philips
Matthew J. Picardi
David R. Poe
Shelby L. Provencher
Demetrios G. Pulas, Jr.
Leslie P. Recht
Steven G. Thomson Reed
Presley R. Reed
Douglas G. Robinson
Patrick C. Rock
Jerry E. Rothrock
Sherrie N. Rutherford
Keith T. Sampson
Mindi Sauter
Laura M. Scheips
Sue Ann Levin Schiff
Charles S. Schultz
Jennifer Lokenvitz Schuizer
Peter M. Schwolsky
Helen S. Shepherd
Charles H. Shoneman
Timothy K. Shuba
S. Kinnie Smith, Jr.
William H. Smith, Jr.
Alice V. Sterkel
Kevin M. Sweeney
David M. Sweet
F. Alvin Taylor
Branko Terzic
Carolyn Y. Thompson
James L. Thorne
Eugene E. Threadgill
Thomas C. Trauger
Edmunds Travis, Jr.
Gregory A. Troxell
James B. Vassie
Steven I. Venezia
Clinton A. Vine
Thomas George Wagner
Cheryl J. Walker
Linda L. Walsh
David B. Ward
Wendy B. Warren
Robert S. Waters
Jeffrey D. (Dan) Watkiss
Joseph F. Weiler
Adam Wenner
Stanley W. Widger, Jr.
Joseph K. Witmer
Raymond B. Wuschl
H. Peter Young
Alan Z. Yudkowsky

*As of February 25, 2005
CHARITABLE FOUNDATION
OF THE ENERGY BAR ASSOCIATION

The Charitable Foundation of the Energy Bar Association recognizes with appreciation the following institutions and individuals whose generous contributions as Founders have played a critical role in establishing the Charitable Foundation on strong financial footing:

PLATINUM FOUNDERS
($20,000 Contribution)

Troutman Sanders LLP
Van Ness Feldman, P.C.

GOLD FOUNDERS
($10,000 Contribution)

Chadbourn & Parke LLP
Day, Berry & Howard LLP
Dewey Ballantine LLP
Sidley Austin Brown & Wood LLP
Sullivan & Worcester LLP
Public Service Enterprise Group Inc. (PSEG)

SILVER FOUNDERS
($5,000 Contribution)

Bracewell & Patterson, L.L.P.
Bruder, Gentile & Marcoux, L.L.P.
Duncan, Weinberg, Genzer & Pembroke, P.C.
Harkins Cunningham LLP
Heller, Ehrman, White & McAuliffe LLP
Hunton & Williams
Jones Day
Miller, Balis & O’Neil, P.C.
The Morrison & Foerster Foundation
Northeast Utilities
Preston Gates & Ellis LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Steptoe & Johnson LLP
Stinson Morrison Hecker LLP
Swidler Berlin LLP
Thelen Reid & Priest LLP
Wright & Talisman, P.C.

INDIVIDUAL FOUNDERS
($2,000 Contribution)

Donna M. Atanasio
Richard P. Bonnifield
Stuart A. Caplan
Lisaanne Crowley & Dwight Dickinson
David & Dianne Doot
Derek, Helen & Robbie Dyson
Mark R. Haskell
Barbara K. Heffeman
A. Karen Hill
Paul E. Nordstrom
Earle & Catherine O’Donnell
Jeff M. Petrasz
Harvey L. Reiter
Michael Schnitzer
Jacolyn A. Simmons
Mary K. Vasilé
Mark C. Williams