

ENERGY LAW JOURNAL

Volume 24, No. 1

2003

CONTENTS

Editor's Page.....	viii
In Memoriam: Lewis Carroll	ix
In Memoriam: Richard A. Rosen.....	x

ARTICLES

Investing in the "Plain Vanilla" Utility	1
<i>Leonard S. Hyman</i>	
Electricity Deregulation: Lessons Learned From California	33
<i>Peter Navarro and Michael Shames</i>	
May the FERC Rely on Markets To Set Electric Rates?	65
<i>Gerald Norlander</i>	
Electricity in Transition: Implications For Regulation and Antitrust	89
<i>Albert A. Foer and Diana L. Moss</i>	
The Pipeline Safety Improvement Act of 2002	107
<i>Theresa I. Zolet and Susan A. Moore</i>	

NOTE

<i>Consolidated Edison Co. of New York, Inc. v. Pataki</i>	131
--	-----

BOOK REVIEW

The Hydrogen Economy	151
<i>Reviewed by Frederick Moring</i>	

SUBMITTED COMMITTEE REPORTS

Antitrust	157
Electric Utility Regulation	191
Natural Gas	231
Oil Pipeline	261

The Energy Bar Association is proud to
announce the formation of

The Charitable Foundation of the Energy Bar Association

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

**We welcome your contributions and solicit
your participation.**

202-223-5625

www.eba-net.org

Charitable Foundation of the Energy Bar Association

2175 K Street, NW

Washington, DC 20037-1828

**And we gratefully acknowledge those many EBA
members whose generous financial contributions
already have made charitable activities possible.**

ENERGY LAW JOURNAL

Editor-in-Chief
William A. Mogel

Articles Editors
Isaac D. Benkin
Nicholas W. Fels
Joshua Z. Rokach
Carolyn Y. Thompson

Reports Editors
Kristine L. Delkus
Freddi L. Greenberg

Book Review Editor
Jonathan D. Schneider

Notes Editors
Stuart W. Conrad
Alex A. Goldberg
Kenneth G. Hurwitz

Business Manager
Stephen L. Huntoon

THE UNIVERSITY OF TULSA
College of Law
National Energy-Environment Law & Policy Institute

Faculty
Marla E. Mansfield

Student Editors

Editor-in-Chief
Roy D. Tucker

Executive Articles Editor
Harry M. Fernau

Executive Notes & Comments Editor
Lane T. Martin

Scott Helton

Articles Editors
Drew Harding

Matthew Reeves

Notes & Comments Editors
Kari Y. Hawkins

Special Projects Coordinator
Anthony Allen

Sarah Burns
Kelley Callard
Ellen Cordell
Klint A. Cowan
Josh Goins

Student Staff
Diane Hall*
Chris Jones*
Robin Meyers
Pansy Moore-Shrier
Jack Pursley
*Denotes Senior Staff

Christopher Ray
Seth Rice
Christian Szlichta
Corie Tarara
Jeremy Workman

THE ENERGY BAR ASSOCIATION

FOUNDED 1946

OFFICERS

Jacolyn A. Simmons
President

Barbara K. Heffernan
President-Elect

Stephen L. Huntoon
Vice-President

Antoine P. Cobb
Secretary

Donna M. Attanasio
Treasurer

John E. McCaffrey
Assistant Secretary

Lisa S. Gast
Assistant Treasurer

BOARD OF DIRECTORS

Richard P. Bonnifield
M. Lisanne Crowley
David T. Doot
Eugene R. Elrod
Sanford L. Hartman

Mark R. Haskell
David L. Huard
Kurt L. Krieger
Robert H. Loeffler
Paul E. Nordstrom

Jonathan D. Schneider
Mary K. Vasile
Linda L. Walsh
Mark C. Williams

The Energy Bar Association is a non-profit corporation interested in the development of federal energy law. Founded in 1946 as the Federal Power Bar Association, the Association currently has over 2000 members. Included in the membership are government, corporate, and private attorneys in virtually all areas of federal energy practice. 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 which focuses on issues of current interest. The Association also sponsors a number of committees which 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 *A Uniform System of Citation*. A brief biographical statement should be included. All manuscripts should be sent to William A. Mogel, Editor-in-Chief, Dorsey & Whitney LLP, 1001 Pennsylvania Ave., N.W., Ste 400, Washington, D.C. 20004. 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. Stephen L. Huntoon at (202) 216-1125. 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: 24 ENERGY L.J. ____ (2003).
© Copyright 2003 by the Energy Bar Association
ISSN 0270-9163

FOUNDATION OF THE ENERGY LAW JOURNAL

OFFICERS

Kevin M. Downey
Vice-President

Thomas E. Hirsch, III
President

Earle H. O'Donnell
Secretary

Richard Meyer
Treasurer

BOARD OF DIRECTORS

Kevin M. Downey
Alex A. Goldberg
Jeffrey Andrew Gollomp
Barbara K. Heffernan (ex officio)
A. Karen Hill
Thomas E. Hirsch, III

Richard Meyer
William A. Mogel (ex officio)
Earle H. O'Donnell
Jacolyn A. Simmons (ex officio)
Regina Y. Speed-Bost
Channing D. Strother, Jr

EDITOR'S PAGE

“Repeating that we are surrounded does
not qualify as a plan of escape.”

General George C. Marshall

The recent past has been tumultuous for the world and the energy industries. Major energy companies struggle to remain viable, electric restructuring may be shelved, the sanctity of contracts is being challenged, drilling in ANWR remains politically charged and FERC's Standard Market Design initiative is anything but certain.

Nearly contemporaneously with the founding of the *Journal*, the United States, also in the midst of a tumultuous period, created the Department of Energy, which had as one of its missions the promulgation of a national energy policy. The Department of Energy's creation was largely because, in the late 1970s, this Country imported more than half of its petroleum requirements. Today, imports constitute even a larger percentage of our usage.

What does this state of affairs have to do with the *Journal*? Surely it is not because in its nearly 24 years of publication, the *Journal* has offered a comprehensive national energy plan. It has not. But what the *Journal* has done consistently since 1980 (and will do in the future) is to offer diverse, well argued views on important issues affecting all the energy industries.

Although we only are beginning our 24th year of publication, the *Journal* already is embarked on plans to celebrate the milestone of its 25th anniversary. One thing is certain that whatever form the celebration takes, it will acknowledge the gifts, intellectual and otherwise, of all those who are responsible for the *Journal's* success.

William A. Mogel
Editor-in-Chief

IN MEMORIAM

Lewis Carroll, age 82, retired Vice President and General Counsel of Washington Gas Light Company, died on February 20, 2003 after suffering a stroke.

Mr. Carroll had an extensive legal career; much of it devoted to energy law matters. Before joining Washington Gas, he was a supervisory trial attorney with the Federal Power Commission and counsel to Southern Natural Gas Company in Birmingham, Alabama. In 1975, Mr. Carroll was Chief of the Appellate Section in the United States Attorney's office in the District of Columbia for seven years and General Counsel of the Asian Development Bank. He also was in private practice with the Washington, D.C. law firm of Ross, Marsh and Foster. He retired from Washington Gas in 1985 and continued consulting on energy and other legal matters until the time of his death.

Throughout his career, Mr. Carroll was an active participant in several organizations dedicated to development of the legal profession, and in particular organizations involved in energy law. Among other significant activities, he was Chairman of the American Gas Association's editorial board from 1978-1987, during which time he directed the work of more than 30 authors in completing the five-volume reference *Regulation of the Gas Industry*, the first comprehensive treatise on the law of the regulated natural gas industry. He also served for three years as national chairman of the American Bar Association's Committee on Prosecution and he was President of the Research Foundation of the Bar Association of the District of Columbia.

Mr. Carroll also actively participated in the American Corporate Counsel Association, the Inter-American Bar Association and the Inter-American Development Bank. He also lectured at a number of laws schools and participated in numerous national and international forums.

Mr. Carroll was a native of West Virginia and a graduate of Marshall University in Huntington, WVA, where he was honored as distinguished Alumnus in 1993. During World War II, Mr. Carroll served on active duty in the U.S. Navy, earning three battle stars in the Atlantic and Pacific theaters. After the war, he earned his law degree at the University of Michigan Law School in 1949.

He will be missed.

IN MEMORIAM

Richard (Dick) A. Rosan, who died on January 16, 2003 at 90, after a short illness, was one of those extraordinary persons we are blessed to know as we travel through life. His contributions to the energy bar, his clients, and the law were legion, his friendship was like a constant gift to all who knew him, and his integrity was legendary. We all learned at his feet and benefited from his wit, direct manner, and humble wisdom.

To the energy bar, Dick brought his brilliant intellect as a Phi Beta Kappa graduate from Cornell University and Yale law school, where rumor has it he was first in his class. His breadth of legal and practical knowledge from serving for many years as General Counsel of the Columbia Gas System and later as its Executive Vice President, earned him the informal title of the "Moses of Gas Industry Lawyers." AGA's six-volume work, *Regulation of the Gas Industry*, was dedicated to Dick and has become a standard reference work for industry lawyers. And he wrote an extensive history of the Federal Energy Bar Association that appeared in 17 ENERGY L.J. 1 (1996) of the *Energy Law Journal*. His insightfulness and long-term perspective during the tumultuous years of the late 1970s in the gas industry significantly contributed to the direction of the Natural Gas Policy Act of 1978.

Dick's integrity always was rock solid. Just out of law school, Dick joined one of the top Wall Street law firms. One day he learned that a young woman had been rejected by the firm on the grounds of her religious beliefs. He immediately submitted his resignation, even though he was not of the same religion, and barely knew the woman. He simply would not tolerate such behavior.

So Dick, thank you for all you have done for us in the energy bar both professionally and personally. We all will miss you, but your legacy continues through the scores of your colleagues and friends who were fortunate enough to have known you.

FOUNDATION OF THE ENERGY LAW JOURNAL

CONTRIBUTORS*

Corporate/Law Firm

Sustaining

Bruder, Gentile & Marcoux, L.L.P.
Constellation Energy Group, Inc.

Sponsors

Preston Gates & Ellis LLP

Friends

Huber Lawrence & Abell
Van Ness Feldman, P.C.

Contributors

Arizona Electric Power
Cooperative, Inc.
Mary Lynn Bates, Attorney at Law
Bosek Law Firm
Brown Rudnick Berlack
Israels, LLP
Brunenkant & Haskell, LLP
Burlington Resources Oil
& Gas Co.
Albert V. Carr, Jr., Attorney at Law
Carver, Darden, Koretzky, Tessier,
Finn, Blossman & Areaux L.L.C.
Duke Energy
Dynegy Inc.
Edison Mission Energy
Edwards & Associates
El Paso Field Services, L.P.
Energy Business, Inc.

Energy Law Group LLP
Energy & Mineral Law
Foundation
Exelon Corp.
Gorak & Bay, L.L.C.
Griggs & Alder, P.C.
Law Offices of Scott Hempling
Kern River Gas Transmission
Co.
Kris Terry & Associates, Inc.
Marston Law
The Mehle Law Firm PLLC
Middle Tennessee Natural Gas
Utility District
Miller, Balis & O'Neil, P.C.
Tino M. Monaldo, Chtd.
National Rural Electric
Cooperative Association

NW Natural
PacifiCorp
Pepper Hamilton LLP
PSE&G Co.
Public Service Co. of North
Carolina, Inc.
Public Service Company of
New Mexico
Sheinfeld, Maley & Kay, P.C.
Stikeman Elliott
Strategic Power Management,
Inc.
Utility Resource Consulting
Inc.
Wisconsin Public Power,
Incorporated System

Individual

Sustaining

Stephen A. Herman

Sponsors

John H. Harrington
Peter C. Kissel
William M. Lange
Mark C. Williams

Richard D. Avil, Jr.
Thomas F. Brosnan
G. Mark Cook
Roger B. Cooper
Donald K. Dankner
Clark Evans Downs
Eugene R. Elrod
Paul W. Fox
Freddi L. Greenberg
R. David Hendrickson
Andrea R. Hilliard
Thomas E. Hirsch, III

Friends

Kenneth G. Hurwitz
Donald A. Kaplan
Brian J. McManus
Randolph Q. McManus
Andrew P. Mosier, Jr.
Leslie P. Recht
Frank P. Saponaro, Jr.
William S. Scherman
David R. Stevenson
Mary K. Vasile
Catherine Carl Wakelyn

Contributors

Ernest B. Abbott
Susan Ackerman
Paul G. Afonso
Janice A. Alperin
Allan W. Anderson, Jr.
Jason Austin
George A. Avery
James H. Bailey
Bernays T. Barclay

James H. Barkley
Harry E. Barsh, Jr.
Bud J. Becker
Michael R. Beiting
William O. Blome
David I. Bloom
Donna J. Bobbish
Ray S. Bolze
Ruth A. Bosek

J.A. Bouknight, Jr.
John P. Bowman
Lisa G. Bradley
Terence M. Brady
Steven H. Brose
Henry E. Brown
Charles H. Brownman
Neil H. Butterklee
M. Hampton Carver

Michael T. Cash
Carol Caul
David C. Champion
Daniel F. Collins
John H. Conway
David N. Cook
Michael D. Cotleur
David F. Crabtree
Mark S. Crews
Richard D. Cudahy
Alice C. Curtiss
Robert L. Daileader, Jr.
Charles M. Darling, IV
Anthony C. DeCusatis
William D. DeGrandis
Kimberly H. Despeaux
Hon. Romulo L. Diaz, Jr.
Anthony C. Duenner
M. Douglas Dunn
Thomas J. Eastment
Rodger T. Ederer
Leslie B. Enoch, II
Peter G. Esposito
Joseph H. Fagan
Robert S. Fleishman
Philip A. Fleming
Cheryl M. Foley
Frances E. Francis
David W. Freer
Eric T. Fresch
Joseph F. Furay
Jeffrey L. Futter
Duejean Garrett
Linda S. Gilbert
Elisa J. Grammer
Marsha L. Gransee
Richard C. Green
Cheryl K. Hachman
Walter R. Hall, II
Roberta Lee Halladay
Lynn N. Hargis
Roland V. Harris
Joseph R. Hartsoe
John C. Herbert
Patrick J. Hester
A. Karen Hill
Carl D. Hobelman
James J. Hoecker
Marcia C. Hooks
J. David Hughes
Stephen L. Huntoon

Ernest J. Ierardi
Timothy P. Ingram
Daniel M. Ives
James P. Johnson
Patrick Johnson
Thomas G. Johnson
Edward D. Kee
Paul B. Keeler
Robert W. Kehres
Don L. Keskey
Michael L. Kessler
Jennifer L. Key
Bruce F. Kiely
Martin V. Kirkwood
Richard J. Kruse
George R. Laidlaw
Julia A. Lake
William Lansinger
Stephen R. Larson
Melissa L. Lauderdale
Karyl McCurdy Lawson
Dean H. Lefler
Jason F. Leif
Frank Lipson
Robert H. Loeffler
Michael A. Lueder
Jay P. Lukens
William J. Madden, Jr.
Michael R. Mangham
Philip M. Marston
John P. Mathis
Becky McGee
Richard M. Merriman
Richard Meyer
Rebecca J. Michael
Paul B. Mohler
Julia Moore
H. Liza Moses
Robert J. Mussallem
C.M. (Mike) Naeve
Robert A. Nelson, Jr.
Earle H. O'Donnell
Norman A. Pedersen
J. Michael Peters
Marjorie R. Philips
Matthew J. Picardi
David R. Poe
Shelby L. Provencher
Demetrios G. Pulas, Jr.
Steven G. Thomson Reed
Randall S. Rich

Douglas G. Robinson
Patrick C. Rock
Wayne L. Rogers
Jerry E. Rothrock
Sherrie N. Rutherford
Jane I. Ryan
Keith T. Sampson
Daniel L. Sanford
Frank P. Saponaro, Jr.
Mindi Sauter
Sue Ann Levin Schiff
Charles S. Schultz
Jennifer Lokenvitz Schwitzer
Peter M. Schwolsky
Mark S. Shaffer
Helen S. Shepherd
Charles H. Shoneman
Timothy K. Shuba
Richard G. Smead
S. Kinnie Smith, Jr.
William H. Smith, Jr.
Regina Y. Speed-Bost
Alice V. Sterkel
David R. Stevenson
David M. Sweet
F. Alvin Taylor
Carolyn Y. Thompson
Tyrus H. Thompson
James L. Thorne
Eugene E. Threadgill
Thomas C. Trauger
Edmunds Travis, Jr.
Gregory A. Troxell
Carla J. Urquhart
James E. Vallee
James B. Vasile
James Volz
Thomas George Wagner
Cheryl J. Walker
Linda L. Walsh
David B. Ward
Wendy B. Warren
Robert S. Waters
Jeffrey D. Watkiss
Joseph F. Weiler
Adam Wenner
Stanley W. Widger, Jr.
Joseph K. Witmer
Raymond B. Wuslich
H. Peter Young
Michael A. Yuffee

*As of April 3, 2003