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SYMPOSIUM REMARKS

THE BLACKOUT OF 2003: WHAT IS NEXT?

Joel B. Eisen *

The blackout of August 2003 was a massive dislocation of American life, with millions of people in eight states and Canada losing power and a cost estimated in billions of dollars.¹ As many as fifty million people were affected by the blackout.² While the ultimate cause of the blackout is still being investigated, the implications for national policy may not be fully known for decades.

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The Merhige Center has been fortunate to undertake this initiative under the leadership of our new dean, Rodney Smolla, who is not only one of the nation's leading constitutional law experts, but also a very dynamic, positive, and enthusiastic leader. The law school is a true hot-house of innovation, and it is an infectious climate in which to be coming forth with this vision of what this center can be. The center owes many thanks to our local alumni who have put in hour after hour assisting us in planning for this symposium: Janice Moore at McGuireWoods, Jay Holloway at Hunton & Williams, Allison Held at the State Corporation Commission, and Paige Holloway of Advantus Strategies. The school's Associate Dean, Kristine Henderson, managed travel and other logistics. My administrative assistant, Anne Major, my research assistants, Anne Haith and Heather Lyons, and a platoon of students contributed greatly. Angela Schettine and Cindy Stubbe of our development office worked tirelessly to build bridges between the law school and our talented alumni in the energy law field. Our library staff made the technology of the symposium possible, and I would like to specifically acknowledge our students Paul Ranney and Suzanne Palmer for their efforts in filming the symposium.

1. U.S.-CANADA POWER SYS. OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS 1 (2004), available at <https://reports.energy.gov/BlackoutFinal-Web.pdf> (last visited Nov. 9, 2004).

2. *Id.*

The blackout was a wakeup call and a watershed event that calls for reevaluation of just about every facet of the electric utility industry. We tend to think of a "wakeup call" as something that awakens us from a moribund state, but this event was different. For the past decade and longer, the electric power industry has already been grappling with fundamental changes. Restructuring,³ the introduction of competition at the retail and wholesale levels, the costly and protracted debates about the intersection of the federal Clean Air Act with the industry,⁴ all of this activity was taking place and already redefining the industry at the time the blackout happened.

So, if there was a wakeup call, it is up to us to examine the link between the physical failures of the blackout and this upheaval in the industry. My charge to our speakers and panelists today was to see this from the perspective of those here today who would not know an RTO⁵ from a Pontiac GTO. They want to know that when they wake up in the morning and flip the light switch, the power is going to be there. They do not understand open access transmission tariffs,⁶ Independent Service Operators ("ISOs"),⁷ Firm Transmission Rights ("FTRs"),⁸ and the rest of this alphabet

3. The proper term for the upheaval in the industry is "restructuring" and not "deregulation" because only part of the industry is truly being deregulated; transmission and distribution functions remain largely in the hands of incumbent utilities. See, e.g., Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1277-78 (1998).

4. See Joel B. Eisen, *A Critique of the Regulations Revising the U.S. Clean Air Act's New Source Review Program* (paper presented at the 13th World Clean Air and Environmental Protection Congress and Exhibition, London, U.K., Aug. 24, 2004) (paper on file with author).

5. An "RTO" is a Regional Transmission Organization, as envisioned in the series of Federal Energy Regulatory Commission ("FERC") rulemaking initiatives on market design in the electric power industry. See Joel B. Eisen, *Regulatory Linearity, Commerce Clause Brinkmanship, and Retrenchment in Electric Utility Restructuring*, 40 WAKE FOREST L. REV. (forthcoming May 2005) [hereinafter Eisen, *Regulatory Linearity*].

6. FERC's first major set of regulations designed to spur restructuring of the electric industry was "Order 888," adopted in 1996. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996) (codified at 18 C.F.R. pts. 35 & 385) [hereinafter Order 888]. In Order 888, FERC required all public utilities within its jurisdiction to have on file "open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service." *Id.*

7. In Order 888, FERC called for the establishment of ISOs to manage the transmission grid and ensure transmission reliability. *Id.* at 21,542.

8. In FERC's proposed market design, it called for the use of FTRs as an economic mechanism to help allocate scarce transmission capacity in conjunction with "locational

soup. It is our job to explain the relationship of all this to the blackout in ways that make sense in legal, economic, and political terms and also make sense to the average consumer of electricity, who has an important stake in the future of the system.

What will we learn from the blackout? There are sharp disagreements about what should be done now. There are some who would say the best response is to finish the job of transitioning to wholesale and retail competition,⁹ while others who would say it must slow down, or at the very least, undergo some fundamental rethinking.¹⁰

This is not surprising, for the attitudes of our speakers and panelists reflect some of the most timeless themes in American jurisprudence: What is the appropriate balance of power between the federal government and the states? Should government at any level take it upon itself to chart the future of this industry, certainly one of America's most essential industries? Or should it be left to the participants themselves to decide such matters as how much is spent on upgrades to the transmission grid? When, as has been the case in this industry, the participants have the ability to control the market even when we introduce competition, what oversight should there be and who should do it?

Historically, when the industry was fully regulated, there was a balance of responsibility between the states and the federal government. In the new era of competition, the jurisdictional lines are at once clear, as they have been defined by the Supreme Court of the United States in the *New York v. FERC*¹¹ decision, and unclear in the real world. There is real tension—as exemplified by the battle over the Federal Energy Regulatory Commission's ("FERC") Standard Market Design ("SMD") proposal¹²—

marginal cost pricing." *Id.* at 21,598; see also David Hadley, Harvard Electricity Policy Group, *Successful Market Design: What Should A State Want?* (Dec. 12, 2003) (suggesting that states should favor the adoption and use of FTRs), at <http://www.ksg.harvard.edu/hepg/Papers/Hadley.SMD.States.Want.12.Dec.03.pdf> (last visited Nov. 9, 2004).

9. See Joseph T. Kelliher, *The Need for Mandatory Electric Reliability Standards and Greater Transmission Investment*, 39 U. RICH. L. REV. 717 (2005).

10. See Hulihan Williams Moore, *Competition: The Wrong Goal*, 39 U. RICH. L. REV. 739 (2005); see also Eisen, *Regulatory Linearity*, *supra* note 5 (calling for reevaluation of FERC's role in restructuring and development of a new national program for electric power).

11. 535 U.S. 1 (2002).

12. Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, 67 Fed. Reg. 55,452 (proposed Aug. 29, 2002) (to

that makes proceeding on these issues of national importance all the more difficult. The energy bill pending before Congress,¹³ with its electricity title that would redefine many of these issues in sweeping fashion, adds to a climate of uncertainty.

Meanwhile, I return to that consumer who wants reliable electricity—and whatever economic benefits competition would bring. Virginia is a microcosm of the national debate over restructuring,¹⁴ with the progress toward full competition varying widely among states.¹⁵ The promise is there, and there would certainly be those who would say that competition must be a healthy force for change when it arrives. But it is not here yet,¹⁶ and it is hard to imagine how deregulating only part of the industry and leaving the rest of it regulated is going to benefit consumers.¹⁷ There are a lot of major issues to work out; I am hopeful, but retain a healthy skepticism.

be codified at 18 C.F.R. pt. 35). FERC's response to the backlash brought on by the SMD was a brief document titled the "White Paper: Wholesale Power Market Platform," issued in 2003. FED. ENERGY REG. COMM'N, Docket No. RM01-12-000, WHITE PAPER: WHOLESAL POWER MARKET PLATFORM (2003), available at http://www.ferc.gov/industries/electric/indus-act/smd/white_paper.pdf (last visited Nov. 9, 2004). That document restated many of the goals embodied in the SMD and has itself been the subject of controversy.

13. H.R.J. Res. 6, 108th Cong. (2003).

14. The Virginia General Assembly has this year extended the transition period to full competition to year 2010, reflecting uncertainty about restructuring's status. Act of Apr. 14, 2004, ch. 827, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 56-582(F) (Supp. 2004)). Virginia is not alone in its "transition" status. See NAT'L COUNCIL ON ELEC. POLICY, A COMPREHENSIVE VIEW OF U.S. ELECTRIC RESTRUCTURING WITH POLICY OPTIONS FOR THE FUTURE 74-75 (describing the challenges faced in those states with deadlines looming for the end of the transition to full competition), available at <http://www.ncouncil.org/restruc.pdf> (last visited Nov. 9, 2004).

15. See U.S. Dep't of Energy, Status of State Electric Industry Restructuring Activity—as of February 2003, at http://www.eia.doe.gov/cneaf/electricity/chg_str/restructure.pdf (last visited Nov. 9, 2004); GoodEnergy, Deregulations: The Basics, at http://www.goodenergy.com/electricity_deregulation/deregulation.asp (last visited Nov. 9, 2004) (updating states' activities through 2004). Many states have delayed restructuring or have retained "bundled" (traditional, non-deregulated) status. Some states, including New Mexico, have repealed their restructuring laws. See, e.g., 2003 N.M. Adv. Legis. Serv. 718.

16. Switching rates for residential customers are far less than ten percent in most states nationwide, even in states with full competition. See NAT'L COUNCIL ON ELEC. POLICY, *supra* note 14, at 25-26.

17. See, e.g., TRANSMISSION ACCESS POLICY STUDY (TAPS) GROUP, EFFECTIVE SOLUTIONS FOR GETTING NEEDED TRANSMISSION BUILT AT A REASONABLE COST 6-7 (2004) [hereinafter TAPS GROUP STUDY] (noting that, because incumbent utilities own the transmission system, it is inherently uncompetitive), available at <http://www.tapsgroup.org/EffectiveSolutions.pdf> (last visited Nov. 9, 2004).

At its heart, the blackout is about reliability:¹⁸ who has responsibility for overseeing the grid, and what changes need to be made to ensure that it is reliable at all times? Most casual observers would be surprised, I think, to hear about the proliferation of entities with some operational control over the grid and the lack of nationwide reliability standards.¹⁹ Since the 1960s blackouts, we have had the North American Electric Reliability Council (“NERC”), the voluntary reliability organization.²⁰ What changes will this event bring for reliability?²¹

The nation’s electricity transmission grid is not, as has been famously charged, a “third world” grid.²² Like the interstate highway system, it is an engineering feat the likes of which many of us have never seen. On a daily basis, it makes toasters and computers work. But the grid is showing signs of stress, much as parts of the highway system do.²³ Bottlenecks are apparent and we speak of “congestion”²⁴ as a fact of life, much as it is for the urban commuter. Certainly this is not an acceptable solution for the long-term. When we look to address the causes of this problem, it is not easy to decide what to do. Competition has brought new generation capacity to the grid without complementary up-

18. For a description of how competition in the industry has exacerbated stress on grid reliability, see generally N. AM. ELEC. RELIABILITY COUNCIL, 2003 LONG-TERM RELIABILITY ASSESSMENT 7 [hereinafter NERC 2003 ASSESSMENT], at ftp://www.nerc.com/pub/sys/all_updl/docs/pubs/LTRA2003.pdf (last visited Nov. 9, 2004).

19. See U.S. DEPT OF ENERGY, NATIONAL TRANSMISSION GRID STUDY: OUR NATIONAL TRANSMISSION SYSTEM TODAY AND TOMORROW 2 fig.1.1 (2002) [hereinafter U.S. DEPT OF ENERGY, NATIONAL TRANSMISSION GRID STUDY] (stating that “more than 140 control areas” manage the grid), available at http://certs.lbl.gov/NTGS/MAIN_1.pdf (last visited Nov. 9, 2004).

20. Details about the NERC are available on the organization’s website at <http://www.nerc.com> (last visited Nov. 9, 2004).

21. See Kelliher, *supra* note 9, at 720 (calling for mandatory reliability standards).

22. William Glanz, *Outage “A Wake-Up Call” for System Modernization*, WASH. TIMES, Aug. 15, 2003, at A1 (disagreeing with widely quoted comments to this effect by New Mexico Gov. Bill Richardson).

23. NERC 2003 ASSESSMENT, *supra* note 18.

24. In her remarks prepared for this symposium, Linda Stuntz demonstrates that there is “[i]ncreasing congestion even in areas with RTOs.” Linda G. Stuntz, Remarks at the University of Richmond School of Law Symposium, *The Blackout of 2003: What’s Next? Transmission Investment, Restructuring, and the Future of the Electric Utility Industry* (Apr. 2, 2004) (noting that the TLR record shows this) (transcript on file with author). See also U.S. DEPT OF ENERGY, NATIONAL TRANSMISSION GRID STUDY, *supra* note 19, at 10–18, 12 fig.2.1, 15 fig.2.2, 13 tbl.2.1 (2002) (describing and mapping points of congestion throughout the nation).

grades to the system.²⁵ Siting new facilities is difficult and time-consuming. The result is a dearth of investment in new transmission technologies and infrastructure. Who will take on the responsibility of deciding how much we need, how to pay for and build it?

We are here today to address these issues and many more. This symposium represents a new day for our Merhige Center—a re-launch with this focus on the intersection of energy and environmental law. Two years ago, when we embarked on this quest to develop an energy and environmental law initiative for the Merhige Center, we could not have dreamed that today we would be surrounded by this incredible collection of talent. The speakers and panelists draw from the top level of decision makers in the industry: a commissioner of FERC, a former chair of the Virginia State Corporation Commission, three chief executive officers of the companies that make the grid work and oversee markets for electricity, representatives from the legal and public policy academic communities, and a sterling group of private sector attorneys.

Among them, they have literally hundreds of years of experience in thinking, writing, deciding, and planning for the future of this industry. From New England to the mid-Atlantic region to Florida to Washington state, and of course Virginia, they have come from all corners of the country to Richmond to share their insights with us and to engage with us in discussion and debate about the future of the industry.

This is a terrific example of what an academic center does best—bring together the experts in the field at one time in one place, in a nonpartisan environment, to discuss issues that are foremost in the state and national consciousness.

Our center is also one of the cornerstones of a new plan at the law school that is bold and different, and designed to enhance our national reputation. Under the plan this center would be joined by other academic centers, and the law school would be expanded to bring in more talented faculty and more students. The Merhige Center would be part of that.

25. See NERC 2003 ASSESSMENT, *supra* note 18, at 5; TAPS GROUP STUDY, *supra* note 17, at 4.

The center will grow and expand over the next few years. In the near term, there will be follow-up activities to address important issues that will be highlighted today. Eventually, the center should be a major source of nonpartisan information and law reform proposals in this energy law field. The current debates are not especially partisan in the political sense of Democrats versus Republicans, but can often be polarizing. There is a lot of room for a group that has no stake in the outcome to bring some outside-the-box thinking to bear on these issues.
