

# The Energy Law Advisor

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Volume 5, No.5 -- December 2011

## Industry News



Richard Carrell

### ***Lifetime Achievement in Energy Litigation Award presented to Richard N. Carrell on November 3, 2011***

The Institute of Energy Law was honored to present [Richard N. Carrell](#) with the Lifetime Achievement in Energy Litigation Award during the 10th Energy Litigation Conference held in Houston, Texas on November 3, 2011. After receiving his Juris Doctorate from the University of Virginia Mr. Carrell joined Fulbright, Crooker, Freeman, Bates & Jaworski in 1970, now Fulbright & Jaworski L.L.P., where he has served as a member of the firm's Executive and Policy Committees, and is now a Retired Senior Partner serving as Of Counsel in the firm's Houston office. Mr. Carrell has had a long and distinguished career handling complex commercial litigation including antitrust, securities, contracts and oil and gas related matters. He has been selected by his peers as one of the best lawyers in America for civil litigation as published in The Best Lawyers in America, and has also been listed in the Guide to the World's Leading Litigation Lawyers, Euromoney Publications PLC.

It is a great honor and privilege to recognize Mr. Carrell as the recipient of this year's Lifetime Achievement in Energy Litigation Award, and to publish his acceptance remarks in this issue of the *Energy Law Advisor*.

**[Read Mr. Carrell's remarks.](#)**

### ***FERC Grants Complaint that Reduces the Cost of Generation Interconnection Service for All New Generation Projects in the MISO Region of the United States***

Submitted by: [Bruce Grabow](#), Locke Lord LLP

In October 2011, the Federal Energy Regulatory Commission (FERC) directed the Midwest Independent Transmission System Operator, Inc. (MISO) to remove a provision in its Tariff pertaining to the cost of generation interconnection service. The FERC order has significant beneficial cost impacts for the generation development community in the MISO region. Evidence in the FERC proceeding demonstrated estimated cost savings for one generation developer at just one of its generating sites at \$10 million (NPV) or \$55 million (over time). The FERC decision applies to all new generation interconnection agreements executed as of March 22, 2011.

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**J. Alan B. Dunlop**  
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**Get the full story.**

***New Corporate Compliance Functions Resulting from the SEC's Increasing Interest in Hydraulic Fracturing***

Submitted by: Jeffrey C. Torres, Law Office of Jeffrey C. Torres, P.C.

It should come as no surprise that oil and gas companies engaged in "fracking" are subject to increasing regulatory scrutiny as regulators at every level are focused on ways to force detailed disclosures of risks associated with hydraulic fracturing in underground shale deposits. Today, Arkansas, Michigan, Montana, Pennsylvania, Texas and Wyoming require the disclosure of hydraulic fracturing chemicals, and other states are considering requiring such disclosure. What may come as a surprise to compliance professionals -- already focused on these state requirements and federal regulatory activity initiated by the Environmental Protection Agency, the U.S. Department of Interior, and the U.S. Department of Energy -- is that the Securities & Exchange Commission has apparently aimed its considerable oversight authority on hydraulic fracturing.

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contact Brit Brown at [bbrown@bmpllp.com](mailto:bbrown@bmpllp.com) and [ieladvisor@cailaw.org](mailto:ieladvisor@cailaw.org).

*Members in the News*

Sustaining Member **BP America, Inc.** added Michael Drew (Associate General Counsel, Developments, Houston) as an advisory board member.

Sustaining Member **Squire Sanders & Dempsey (US) LLP** added [Steven B. Harris](#), [Greg R. Wehrer](#) (Houston) and [Lisa G. Henneberry](#) (Washington, D.C.) as advisory board representatives and added [Paula Galhardo](#) (Houston) as one of their young energy professional representatives.



Steven Harris



Greg Wehrer



Lisa Henneberry



Paula Galhardo

A new Sustaining Member is **McGuireWoods LLP** ([Jonathan Blank](#), Chicago).



Jonathan Blank

Supporting Member **Burleson LLP** added [Kevin Colosimo](#) as their young energy professional representative (Pittsburgh) and [Jack Luellen](#) (Denver) as an advisory board representative.

Supporting Member **Thompson & Knight LLP** added [Lucas A. LaVoy](#) (Houston) as their young energy professional representative.

Supporting Member **Wyatt Tarrant & Combs** added [Justin Ross](#) (Lexington) as a young energy professional representative.



Kevin Colosimo



Jack Luellen



Lucas A. Lavoy



Justin Ross

A new Supporting Member is **Pye Legal Group** ([Linda Katz](#), [Susan Pye](#), [Ruth-Ann Sivers](#) and Kristen Olsen Lyons (young energy professional representative) (Houston)).



Linda Katz



Susan Pye



Bill Williams

Sponsoring Member **Hill International, Inc.** changed their advisory representative to Peter Wallace (Senior Vice President, Philadelphia).



Ignacio Santamaria

New Sponsoring Members are **Lloreda Camacho & Co.** ([Ignacio Santamaria](#), Bogota) and **Sower and Messuaris Solicitors** ([Kenneth Odidika](#), Lagos).

New Associate Members are **Zel Sacconi** (President and Owner, SLBT, Brownsville) and [Carol Wood](#) (King & Spalding LLP, Houston).



Carol Wood

New law school members are **SMU Dedman School of Law** ([Sarah Tran](#), Dallas), **Tulane University Law School** ([Amy Stein](#), New Orleans), the **University of Denver Sturm College of Law** ([K.K. DuVivier](#), Denver), the **University of Mississippi School of Law** ([Niki Pace](#), Staff Attorney and Adjunct Professor, University) and the **University of New**

**Mexico School of Law** ([Kevin K. Washburn](#), Albuquerque).



Sarah Tran



Amy Stein



K.K. DuVivier



Niki Pace



Kevin Washburn

New Young Energy Professional Members are [Oyeniya Ajigboye](#) (Consolex Legal Practitioners, Ikoyi, Lagos), **Robert C. Anderson** (Steven S. Toepich & Associates, Houston), **Clara Beuth** (Legal Counsel, Andritz, Geneva), **John Gerner** (Aldmont Energy Resources, LLC, Dallas), [Kraig P. Grahmann](#) (Haynes and Boone, LLP, Houston), [Daniel Mathis](#) (Curnutt & Hafer LLP, Arlington) and [Sarah Besan Shennib](#) (Legal Consultant, DLA Piper LLP, Kuwait City)



Oyeniya Ajigboye



Kraig P. Grahmann



Daniel Mathis



Sarah Besan Shennib

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Submit your member announcements for the next issue, with a photo if possible, to [ieladvisor@cailaw.org](mailto:ieladvisor@cailaw.org).

*Calendar of Events*

**63rd Annual Oil & Gas Law Conference**

February 16-17, 2012 | Houston, Texas

**2nd IEL-ANADE Conference: Renewable Energy**

May 17-18, 2012 | Mexico City, Mexico

**3rd Law of Shale Plays Conference**

June 6-7, 2012 | Ft. Worth, Texas

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# The Energy Law Advisor

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## **Lifetime Achievement in Energy Litigation Award presented to Richard N. Carrell on November 3, 2011**

[Richard N. Carrell](#), Of Counsel, Fulbright & Jaworski L.L.P.

It is very gratifying to be among so many friends and colleagues. When David Winn called me in July to announce this quite unexpected honor, I expressed my surprise on two separate but related bases. The first was that I had never considered myself as an oil and gas lawyer per se and secondly, to the extent I have been, it was never on the level or with the deep, acknowledged expertise of prior honorees like Frank Douglas, John McCollum, Shannon Ratliff, Gene LaFitte, Greg Copeland or last year's honoree, Jack Balagia – with all of whom I have had the pleasure of professional relationships. In the instance of Frank Douglass, I so admired his expertise regarding the history and methodology of the Texas Railroad Commission that I requested his aid as an expert witness in the *Spectrum Stores v. Citgo* case for the proposition that the rules for the OPEC Cartel were modeled – by a Venezuelan graduate of Texas A&M – on the rules of the Railroad Commission. The prior honorees had that depth of knowledge and expertise that I have never approached. Rather, I have always viewed myself as a general commercial litigator representing banks, airlines, box makers, rice growers, accounting firms, underwriters and the like – but as would probably be true for any general litigator over the past decades in Houston or Louisiana or across the Southwest, as I survey what I will call my "body of work", the energy cases do stand out. I will review three of the most notable in a moment. The first in natural gas, the second in coal, the last in crude.

When I joined Fulbright in 1970 or as it was then known as Fulbright, Crooker, Freeman, Bates & Jaworski, all new litigators were handed an insurance docket made up of cast off cases from more seasoned associates. I did not thrive with that docket of open intersection and slip and fall cases, but I quickly realized that there were more interesting and challenging cases to work on if you actively sought the assignment. In those early days of my practice, our Firm was quite likely to be involved in any significant case in Houston so I would survey the news of new filings and then seek out the partner taking on a defendant and volunteer to work on the matter. As a result of those efforts, I participated in a trial arising from the first implantation of an artificial heart – *Karp v. St. Lukes Hospital, Dr. Denton Cooley, et al.* and a lengthy trial in Judge Singleton's court arising from the explosion of the Chambers and Kennedy platform off Galveston during the installation of anti-pollution overflow valves. The focus of that trial, tragically, was the manner and point of death of the crew and contractors since it mattered whether the victim was on the vessel, the rig, or in the water under the prevailing laws. I spent weeks with Grand Jury witnesses in San Antonio representing what was then known as Texas International Airlines in an investigation concerning the opening of Love Field, a fact which I suppose dates me as to most of you. I spent the better part of the 1980's defending Texas Bank Holding Companies in securities class action cases. Invariably rig and production loans were central to those cases. I spent another couple of years defending what may have been the first major Foreign Corrupt Practices investigation undertaken by the Department of Justice. It involved the sale of gas compression equipment to Pemex. It was truly fascinating with an abundance of war stories unsuitable for today.

Nevertheless to return to the theme of general commercial litigation – I recruited for our Firm for many years until I was deemed too impatient or crotchety, I suppose. I always told the law students that I loved the variety that general litigation presented – the need to learn with each new case how different industries worked – airlines, box manufacturers, banks, pipelines, even chicken feed, but I also explained the downside known to you all – in exchange for those exciting, challenging cases came business travel – a LOT of it – my ever supportive family is here today so I apologize for never being home for any emergency. I owe my wife Bettie and younger son Alex a special apology because I left Houston for New Mexico and a ten week trial in Las Cruces when Alex was less than one month old. That case was the New Mexico Natural Gas Litigation which basically amounted to trying the price of natural gas charged to utility customers to a jury of consumers.

The San Juan Basin producers were simultaneously being sued by a class of consumers for inflating the price and by the royalty owners for selling gas too cheaply, but the trial in Las Cruces addressed only the consumers and the New Mexico Gas Utility Company.

There is a reason utility prices and juries don't mix. The situation was made more difficult by the fact that Harry Reasoner and a crew from Vinson & Elkins had been in the same Court the week before us in a well-publicized case trying to secure New Mexico water for El Paso which had the locals really riled up – when we explained that we were only trying to defend high gas prices they calmed down. After that we were simply treated with the ordinary disdain the New Mexicans show toward Texans.

In any event, it was a hard slog in Las Cruces or LasCruciating as we came to call it, but it had its rewards. We were representing Conoco which could not have been a more thoughtful client. Mid-trial they flew Bettie and Alex out for a visit and otherwise supported our effort in every way. My colleagues Gerry Pecht and Dan McClure who are here today became lifelong friends as did Michael Campbell of Santa Fe who represented a particularly challenging co-defendant. The case posed many interesting legal issues under the Noerr Pennington doctrine, direct purchaser issues, damage limitation issues and the like—but a very vivid memory is that the jury which was hardworking and attentive, having been chosen based almost exclusively on the Courts questionnaire and the Courts voir dire resulted in the seating of some jurors who could read and write English for the questionnaire but try as they might could not really understand the Court's voir dire questioning nor the subsequent testimony. In consequence, they had never raised a hand to respond to any general question which may have led to further inquiry. This was a clear instance in which a highly respected judge put speed of jury selection over care. The ultimate result was a reversal based at least in part on the presence of unqualified jurors.

Within a few months, in August 1983 – I was again in trial in El Paso representing a Mexican bank when Hurricane Alicia hit Houston – hard. My client looked at the headlines and said "Rick, you are lucky to miss the storm." I told them the storm would come and go, but that not being there would last me a lifetime. So sorry again family.

This past summer I drove for several hours from Denver to Saratoga, Wyoming with Harry Reasoner and David Hedges. We observed that we had probably had the good fortune to practice through the absolute heyday of the big Houston firms. Our Firms worked together often but we were also frequently opposed. Nevertheless, we always competed on a level and in an atmosphere that seems to have lost some currency. We litigated with fervor but without rancor. No case stands out more clearly for me in this regard than the ETSI litigation in which my friend John Murchison of Vinson & Elkins represented the plaintiff and we represented the Union Pacific Railroad along with Covington & Burling whose partner Gregg Levy ranks as one of the finest colleagues among many over the last 40 years. The case involved the proposed construction of a coal slurry pipeline from Wyoming to Texas and the ad damnum was staggering. The liability theory was that the Western railroads had conspired to deny right of way to the coal pipeline. The case went on for years with discovery from coast to coast with all the attendant scheduling issues, and frustrations, but I do not recall a cross word or refusal to accommodate a personal request over the duration of the litigation. In fact, during a month-long round of depositions in San Francisco, John and I would periodically declare team-wide moratoriums for a joint Chinese banquet or to watch the Rockets play the Lakers in the NBA finals at a Sports Bar miles out Geary Ave. I saw Gene Gallegos in the audience this morning. I haven't seen Gene in years. He was our adversary in New Mexico. I should note that he too, knew how to compete diligently but with courtesy. We used to play tennis in the evenings after sparring all day in court.

Over the last decade, I have often missed that quality of professionalism and absence of swagger. I don't believe lawyers or our profession have changed so much, but we simply don't know one another as well as we once did. So it requires more effort and patience and experience to litigate with some humility and regard for your opponent's obligations and difficulties.

This room is filled with lawyers who were part of the Lease Oil Litigation. It was hard, but it was exhilarating. There are so many friends here today who were participants in that saga. That matter involved the pricing of crude oil at the well. One allegation was that the so-called posted price had been fixed too low. I learned there were high posters, low posters who paid bonuses, and others who really did not want nor need to buy the production of other companies.

I owe a real debt to Mike Graham who was my close colleague and confidant throughout the case but also

to Dan McClure, again, Larry Simon, Russ Howell, Ed Pickle, Steve Johnson from Phillips, David Zott, Greg Copeland and many others who worked hard, well and supportively to find a resolution to a complete morass with cases in state courts from Alabama, to New Mexico to Utah overlaid by the Federal action in which it was ultimately resolved. That was, of course, before the Class Action Fairness Act was enacted so at that time the mixture of State and Federal cases all seeking a national class presented a particularly thorny problem, which required cooperation and creativity and trust on both or perhaps I should say all sides. Lee Godfrey and his colleagues, of course, represented the largest class.

I have had repeated major cases over the years with Lee and with Steve Susman. They are each more than worthy adversaries but through it all, the corrugated cases with Steve and the lease oil case or cases with Lee, they always did what they had committed to do and defended their commitments against attacks from competing plaintiffs and groups. This is an opportunity for me to publicly acknowledge their ability and professionalism.

I have always been too emotional with an unmanly habit of tearing up. I do it for example every time I see Lou Gehrig proclaim himself to be the luckiest man on earth. I may not have been the luckiest but I have had more than my fair share – a wonderful family, lots of friends, good colleagues including Layne Kruse and Jane Dowell who has assisted me tremendously in every case for the past 20 years, a stimulating and rewarding professional life, lots of continuing curiosity, and a decent golf game, how could anyone fairly ask for more? I am very appreciative to be this year's designated Honoree – deserving or not – my good luck has not run out.

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## ***FERC Grants Complaint that Reduces the Cost of Generation Interconnection Service for All New Generation Projects in the MISO Region of the United States***

Submitted by: [Bruce Grabow](#), Locke Lord LLP

In October 2011, the Federal Energy Regulatory Commission (FERC) directed the Midwest Independent Transmission System Operator, Inc. (MISO) to remove a provision in its Tariff pertaining to the cost of generation interconnection service. The FERC order has significant beneficial cost impacts for the generation development community in the MISO region. Evidence in the FERC proceeding demonstrated estimated cost savings for one generation developer at just one of its generating sites at \$10 million (NPV) or \$55 million (over time). The FERC decision applies to all new generation interconnection agreements executed as of March 22, 2011.

### **Background**

Standard FERC policy requires a generator connecting to the transmission grid to pay 100 percent of the cost, up-front, for any upgrades to the utility transmission system to accommodate the interconnection (i.e., network upgrades). Standard FERC policy requires the money to be refunded to the generator upon commercial operation. In the MISO region (covering all or a portion of 12 states), two variations were allowed. First, in 2010, the FERC cut the refund back to essentially zero — so the generator bears 100 percent of the cost of any network upgrades. Second, in 2006, the FERC accepted a Tariff provision that allowed the interconnecting utility, in its sole discretion, after commercial operation of the new generating project, to refund 100 percent of the amounts that the interconnecting generator paid for the network upgrades, but then file a service agreement at the FERC to re-collect that same 100 percent amount over time from the interconnecting generator, with a rate of return, O&M, taxes, etc. built in (known as "Option 1"). The alternative is "Option 2," which provides that the interconnection customer pays no more than 100% of the cost of the network upgrades.

### **FPA Section 206 Complaint**

In March 2011, an ad hoc coalition of generation developers, represented by Locke Lord LLP, filed a Complaint at the FERC to remove Option 1 from the MISO Tariff.

The Complaint argued that Option 1 is unjust and unreasonable in violation of the Federal Power Act (FPA) because: (1) no legitimate service is being provided to justify this higher priced cost for interconnection service — interconnection service already is being provided when Option 1 might be elected by the utility; (2) the generation developer already bore the financial risk in providing the money up-front so the utility could construct the network upgrades — the utility has not put any capital at risk for which it might earn a rate of return; and (3) the principles of cost causation are violated — there is no legitimate cost on the part of the utility and the generator receives no benefit from the higher Option 1 pricing.

The Complaint argued that Option 1 is unduly discriminatory in violation of the FPA because, among other things, it allows generators that compete within the same MISO market to be subject to different interconnection cost policies: utility A may not elect Option 1, which means generators connecting to its transmission system, at most, pay 100 percent of the cost for network upgrades; whereas, utility B may elect Option 1, which means generators connecting to that transmission system pay much more than 100 percent of the cost of network upgrades (evidence showed this could be as much as 338 percent over time or 162 percent NPV).

The FERC allows variations from its standard generation interconnection policies when they are administered by an "independent entity" such as the MISO. The Complaint argued that Option 1 is elected

solely by a utility which is a non-independent entity; the Midwest ISO is not involved at all. The non-independent transmission utility has an incentive to elect Option 1 to garner revenue (which, in turn, increases the price of the generator's power) and to provide a cost advantage to its own or affiliated generation that may compete within the MISO region.

The Complaint was supported by various independent generation developers and national trade associations. The Complaint was opposed by MISO, the transmission-owning utilities within the MISO region and the Organization of MISO States (State regulators within the 12-State region (OMS)).

### **FERC Decision**

The FERC agreed that Option 1 is "unjust, unreasonable, and unduly discriminatory" in violation of the FPA and ordered MISO to remove the provision from its Tariff effective March 22, 2011 (the date the Complaint was filed). The FERC determined "it is unjust and unreasonable to require the interconnection customer to bear the burden of funding the network upgrades up-front but then be repaid these costs and be subjected to a monthly [charge] reflecting the transmission owner's capital costs and income tax allowance, which unreasonably increases the interconnection customer's costs over time—solely at the discretion of the transmission owner." The FERC also ruled, "the fact remains that the Tariff gives the transmission owner the sole discretion to choose . . . Option 1 . . . and, thereby, creates opportunities for undue discrimination."

The MISO transmission-owning utilities and OMS have sought rehearing of the FERC's order.

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Bruce Grabow is Senior Counsel in the Washington, DC office of Locke Lord LLP and practices before the FERC. Mr. Grabow can be reached at [bgrabow@lockelord.com](mailto:bgrabow@lockelord.com) or 202-220-6991.  
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## ***New Corporate Compliance Functions Resulting from the SEC's Increasing Interest in Hydraulic Fracturing***

Submitted by: Jeffrey C. Torres, Law Office of Jeffrey C. Torres, P.C.

It should come as no surprise that oil and gas companies engaged in "fracking" are subject to increasing regulatory scrutiny as regulators at every level are focused on ways to force detailed disclosures of risks associated with hydraulic fracturing in underground shale deposits. Today, Arkansas, Michigan, Montana, Pennsylvania, Texas and Wyoming require the disclosure of hydraulic fracturing chemicals, and other states are considering requiring such disclosure. What may come as a surprise to compliance professionals -- already focused on these state requirements and federal regulatory activity initiated by the Environmental Protection Agency, the U.S. Department of Interior, and the U.S. Department of Energy -- is that the Securities & Exchange Commission has apparently aimed its considerable oversight authority on hydraulic fracturing.

The source of the SEC's concern with hydraulic fracturing apparently arises from shareholder proposals seeking greater hydraulic fracturing disclosures from oil and gas companies. These shareholders are seeking greater disclosure by submitting resolutions for proposals for inclusion in annual proxy statements, pursuant to Rule 14a-8 under the Securities Exchange Act of 1934. Submitters of these proposals tend to be institutional funds and shareholder action organizations. Other supporters of broader disclosures include proxy advisory companies such as Institutional Shareholder Services which, on October 18, 2011, announced a policy encouraging voting in favor of proposals requesting greater disclosure.

Earlier this year, the SEC's Division of Corporate Finance began to evaluate disclosure issues involved with hydraulic fracturing through staff comments to filings by companies including QEP Resources, Inc. and SandRidge Permian Trust. Quicksilver Resources, Inc. and Exco Resources, Inc. also received SEC subpoenas requesting additional information regarding shale gas well production. Although the SEC does not formally regulate hydraulic fracturing activities, the agency's comments and requests for additional technical information can and should be viewed as the beginnings of an informal attempt to regulate the industry. While the propriety of the SEC's recent actions is for lawmakers charged with the agency's oversight, the reality is that compliance professionals should be prepared to make these types of disclosures in the foreseeable future.

Once faced with the requirement to disclose, the question then becomes what to disclose. Public companies are required to disclose information that is material, based on the specific circumstances, but there are no bright-line rules for disclosure where the potential risks and liabilities of a newer technology are unknown or have not yet been demonstrated. Thus, oil and gas companies engaged in "fracking" operations should enjoy some latitude in the near future as to the scope of information provided to the SEC, particularly in Items 101 (Description of Business), 103 (Management Discussion & Analysis), and 503(c) (Risk Factors), in their disclosures required by SEC Regulation S-K. At a minimum, these disclosures should discuss new governmental regulations and policies related to the impact of hydraulic fracturing chemicals on drinking water sources, and the companies' handling of wastewater. Given the SEC's recent involvement, the risk of failing to report other known or suspected environmental risks should weigh against increased liability resulting from governmental action as well as shareholder action.

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