LAW OFFICES

JONES, JONES, CLOSE & BROWN

CHARTERED

A PROFESSIONAL CORPORATION

SEVENTH FLOOR · VALLEY BANK PLAZA

300 SOUTH FOURTH STREET

LAS VEGAS, NEVADA 89101-6026

TELEPHONE
(702) 385-4202
TELECOPIER
(702) 384-2276
(702) 383-0086

CLIFFORD A. JONES
HERBERT M. JONES
MELVIN D. CLOSE
JOSEPH W. BROWN
GARY R. GOODHEART
MICHAEL E. BUCKLEY
WILL KEMP
KIRK R. HARRISON
DOUGLAS C. CROSBY
RICHARD F. JOST
J. RANDALL JONES
WILLIAM A. PREZANT
CHARLES H. McCREA, SR.

DOUGLAS M. COHEN
PATRICIA J. CURTIS
JAMES W. ERBECK
ANTHONY C. GORDON
RICHARD F. HOLLEY
BRIAN E. HOLTHUS
JOHN E. LEACH
PAUL A. LEMCKE
KIRK B. LENNARD
MARK D. LERNER
ROBERT D. MARTIN
STEPHEN M. RICE
NIK SKRINJARIC
KEVIN R. STOLWORTHY

OF COUNSEL
LYLE RIVERA
JANET L. CHUBB

November 3, 1989

Mr. Charles A. Lenzie
Chairman of the Board and
Chief Executive Officer
Nevada Power Company
P.O. Box 230
Las Vegas, NV 89151

Dear Chuck:

Thank you for the copy of the article from Electric Utility Week of October 30 reporting on the PCB cases. What the article reports is precisely what one would expect the major electric equipment manufacturers to say; they are hoping with all their might.

I am not sure what went wrong in the Chattanooga case, but it is axiomatic that one cannot rationally file an action seeking to collect damages until one has experienced damages. Had Nevada Power taken the measures it has taken to replace and/or retrofit PCB equipment without being compelled to do so by Congress or the EPA, it would have had no cause of action because its expenses would have been incurred volitionally.

Our view is that the statute of limitations cannot begin to run until Nevada Power had suffered damages cognizable under the law. That could not have occurred until the EPA made the removal or retrofitting of PCB equipment mandatory.

It is interesting that the defendants in this case demanded to know immediately after we first informed them of Nevada Power's claims (and long before we filed suit) whether any of the equipment removed or retrofitted by Nevada Power was merely PCB contaminated. PCB contaminated equipment, they asserted, could not even be the subject of negotiations for settlement because Nevada Power was not compelled by law to remove it. In short, it is in exactly the position PCB equipment was in prior to 1985. The defendants, of course, want to have it both ways.

We expect that the issue discussed in the preceding paragraph will be tested by a motion for summary judgment, and that the defendants likely will file such a motion right around the end of the year.

Sincerely yours,

Chuck

CHARLES H. McCREA, SR.
for JONES, JONES, CLOSE
& BROWN, CHARTERED

1131H
cc: w/encl. M. Gene Matteucci, Esq.

service.

• The Fast Dispatch program is a two-year pilot program which requires participants to reduce pre-specified loads on 10-minutes' notice year-round. On Sept. 1, SMUD signed two contracts totaling 19 MW, and the goal for summer 1990 is 24 MW.

• As of August, 32 firms had contracts with SMUD for its Curtailable Service program resulting in a 7.7-MW load reduction. Due to the new fast dispatch option, this program's growth has been curtailed to 10 MW in 1990.

• A new commercial air conditioning load management program is projected to double its current load reduction to 1,050 kW by 1990.

The SMUD report recognizes that the load management goals can only be achieved if the SMUD board restructures rates to increase the incentive payments for residential air conditioner cycling and incorporates various industrial/commercial programs into rates. In addition, the report recommends the capitalization, as opposed to expensing, of one-time, non-recurring demand-side expenditures whose benefits extend over long periods of time. It is expected that the SMUD board will approve rate changes by early December.

IDAHO PUC TAKES CONSERVATION POLICY STANCE; NOD TO RETURN ON INVESTMENT

Effective conservation programs can help maintain or even improve the return on utility investment, the Idaho Public Utilities Commission said in a policy statement climaxing a six-month study (Case GNR-E-89-2, Order 22758).

"The lost revenue from successful conservation programs represents a potential damper on utility investment in conservation programs," the commission said. "Utilities need not lose by promoting increased energy efficiency on the part of their customers."

The commission said it wanted to "encourage utilities to move from a traditional role of primarily being a generator of electricity (a role in which lost revenue seems logically to follow from lower sales) to a broader role of electricity service provider. In such a role, utilities can earn a return on investments that would actually provide equal or even better energy service while reducing actual kilowatt-hour sales to a given customer."

A proposal by Pacific Power & Light for an energy service charge was termed "promising" by the commission. The charge would allow the power company to earn on its investment in a building's conservation measures while lowering the building's total electric bill.

"The invitation to the utility to cross the customer's threshold in pursuit of earnings is not new," the PUC said. "It is older than regulation. Only the opportunity has changed. The 'light' in a power company's present or original name is a remnant of an era when electric companies sold incandescent bulbs. It proved to be a foot in the door."

The commission said, "Here in Idaho, abandonment of the all-electric tariff was utility-initiated when the economy-of-scale balance shifted in the movement from all-hydro generation into thermal plant, ahead of the national oil energy crisis of the 1970s and the double-digit inflation and cancelled nuclear plants of the early 1980s."

"In the same two decades," the order concluded, "conservation and environmental concerns assumed a central place in the nation's agenda and are now the subject of international protocols. In pursuing this maturing opportunity for service, we see no other institution so well equipped as the electric utility. It can best coordinate, direct and particularize the most efficient application of energy resources. Surely, the utility is as fully entitled to profit from this growing function as, in another time, from the sale of incandescent lamps."

ENVIRONMENT

VENDORS SAY COURT RULING CLEARLY SHIELDS THEM ON UTILITY PCB SUITS

Officials with major electric equipment manufacturers say that a strong ruling in their favor handed down by the U.S. Court of Appeals for the Sixth Circuit in Cincinnati in July appears to have ended a controversy over whether utilities can sue manufacturers to recover replacement costs for equipment using PCBs.

The Electric Power Board of Chattanooga, which was the main plaintiff in the case (Docket No. 88-5372), has not yet decided whether to appeal the decision to the U.S. Supreme Court. But officials of General Electric say the strong opinion by the court that manufacturers have clear statute-of-limitations protection in such PCB cases should discourage further action.

"This was the first such case to reach the appeals levels," said Mansfield Neal, a spokesman for the GE Power Delivery Division in King of Prussia, Pa. "It leaves little to chance and should make any utility really examine what the law is before they go down the same path."

The Chattanooga utility, along with the Huntsville (Alabama) Utilities Board had filed suit in August 1985, in federal district court in Greenville, Tenn., asking that eight manufacturers replace up to 35,000 pieces of equipment that were either sold to them containing PCBs or had become contaminated by PCBs. The total value of the replacement was put at about $12-million.

The utilities argued that the equipment suppliers had fraudulently concealed the dangers of PCBs from the buyers and therefore were liable under normal warranty guarantees to make restitution. However, the key issue in the case became at what point the utilities had become aware of the dangers of PCBs and whether they had acted to file suit within four years of that date, which is the limit allowed under Tennessee statute-of-limitations law.

The utilities argued that they had become concerned over the use of PCBs in transformers in July 1985, when the Environmental Protection Agency published final rules prohibiting new installation of such equipment and ordering a phaseout of older equipment by 1990. They filed the suit immediately afterwards, well within the four-year limit.

However, the defendants argued that the danger of PCBs had been made clear to any informed observer by 1976 when the Toxic Substances Control Act was passed, which contained rules on how to dispose of PCBs. While the EPA had ruled in 1979 that PCBs enclosed in transformers were still allowed, this had been knocked down by the courts in the early 1980s, further demonstrating the dangers. Because of this, the manufacturers claimed the four-year period in which the utilities had a right to claim damages was long past by 1985.

The defendants added that the electric power industry had systematically played down the dangers of PCBs through the early 1980s and thus the seeming lack of concern before the EPA finally lowered the boom in 1985 was contrived for political purposes.

In July 1988, the district court ended a series of decisions that rejected the utilities' case on summary judgment, saying the utilities had knowledge of the PCB problem in 1976 and the appeals court totally upheld the decision. According to the opinion, the record showed "with crystalline clarity that the utilities had actual knowledge of the hazards of PCBs as used in electric equipment" far earlier than claimed.

It added the utilities' arguments to the contrary appeared to be "specious" because of their opposition to PCB regulation until 1985. The fact that the utilities immediately became concerned over PCBs after they lost the regulatory battle "diminishes the credibility of their claims," the court said.

The court added that the fraudulent concealment argument was negated by the general amount of knowledge available about PCBs, even if it could be shown that the manufacturers acted to withhold some information about PCBs from EPA officials. Also, the court found that the state statute of limitations was not superceded by federal law under the Comprehensive Environmental Response Compensation Law (CERCLA) because PCBs had not been "released" into the environment.

Besides GE, other defendants were Central Moloney Inc.; Wagner Electric Corp.; Westinghouse Electric Corp.; Sangamo Electric Corp.; McGraw-Edison Co.; Allis-Chalmers Corp. and PCB manufacturer Monsanto Co.

In early July, before the Sixth Circuit decision was released, Nevada Power had filed a similar suit against several equipment manufacturers in a state court in Nevada. The case has since been moved to the federal district court in Las Vegas and is in the initial discovery stage (CV-S-89-555). While the equipment makers claim the Sixth Circuit ruling should play a major role in the Nevada case, utility officials say their legal approach is different from the earlier case and will not have an impact.

TECO TO PAY EPA FINE FOR DISCHARGE OF POLLUTED WATER FROM COAL PLANTS

Tampa Electric has agreed to pay a $136,000 fine levied by the U.S. Environmental Protection Agency for illegally discharging contaminated water from its coal-fired generating plants about 50 times during the past five years (EPA Case No. CWA-IV 89-534).

A company spokesman said the violations of TECO's surface waters discharge permit came under the federal Clean Waters Act. In all, the spokesman estimated about 3.2 million gallons were illegally discharged from a total of about 9.2 billion gallons.

Environmental officials reported that the waste water, which was mixed with coal, contained traces of heavy metals such as mercury, arsenic, cadmium and chromium. However, no environmental damage was reported from the spills.

TECO reported that approximately $72,000 of the fine applies to the utility's Big Bend generating station, where the largest and most recent spill occurred on Dec. 31, 1988, when 571,000 gallons overflowed from a waste pond.

Plant Gannon accounted for the remaining $64,000 in fines. Gannon's largest and most recent spill was on Sept. 6, 1988, when 772,000 gallons were dumped into Tampa Bay after storm-water ditches overflowed during heavy rains. Both plants are located in Hillsborough County, near Tampa.

"We feel the EPA is essentially pleased with all of the corrective measures that we have taken to remedy the problems that occurred," the TECO spokesman said. "The EPA could have elected to do much more than just impose an administrative penalty and chose not to do so."

A variety of corrective measures were used, including sandbagging, increased use of portable pumps, enlarging containment ponds, creation of dike areas and installation of alarm systems.

NPPC ADOPTS $100-MILLION WILDLIFE PROTECTION PLAN; BPA TO TAKE LEAD

The Northwest Power Planning Council has adopted a $100-million plan to protect and rebuild wildlife populations damaged by federal hydropower dams since the 1930s. The plan ranks as one of the nation's largest efforts of its kind.

As an interim step, the Bonneville Power Administration will launch a $35-million program to cover part of the 10-year plan. Initial funding is expected to be about $5-million a year and the program could be underway by late 1990. The council said that if all of these costs were passed on, ratepayers could see a 5-cent to 9-cent increase in monthly electric bills.

Negotiations with Congress later will determine how much of the remaining 65% of the project would be paid by the Bureau of Reclamation and the Corps of Engineers. These agencies are involved because the 13 dams in the Columbia River Basin watershed are multi-purpose for not just electricity but irrigation, flood control and navigation as well.

If all the additional wildlife mitigation efforts that are under development were to be approved by the council, total cost could run up to $12-million a year over the next decade. This includes mitigation proposals that state and federal agencies already have submitted for Grand Coulee Dam in Washington, four dams in Idaho (Palisades, An-