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HOUSE BILL NO. 797

Offered January 21, 2000

A BILL to amend and reenact §§ 56-231.16, 56-231.30, 56-231.34:1, 56-231.39, and 56-231.50:1 of the Code of Virginia, relating to utility consumer services cooperatives and utility aggregation cooperatives.

Patrons—Wagner, Bryant, Scott, Shuler and Tata; Senators: Potts, Saslaw, Trumbo and Wampler

Referred to Committee on Corporations, Insurance and Banking

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-231.16, 56-231.30, 56-231.34:1, 56-231.39, and 56-231.50:1 of the Code of Virginia are amended and reenacted as follows:

§ 56-231.16. Organization; purpose.

A. Any number of natural persons not less than five may, by executing, filing and recording articles of incorporation as hereinafter set forth, form a cooperative, either with or without capital stock, not organized for pecuniary profit, for the principal purpose of making energy, energy services, and other utility services available at the lowest cost consistent with sound economy and prudent management of the business of such cooperative and such other purposes as its membership shall approve: (i) provided, however, that within its certificated service territory, no such cooperative shall, prior to July 1, 2000, undertake or initiate any new program (a) to buy or maintain an inventory of HVACR equipment or household appliances, (b) to install or service any such equipment or household appliances for customers, unless such service is not provided by the cooperative but by a third party individual, firm or corporation licensed to perform such service, (c) to sell HVACR equipment or household appliances to customers metered and billed on residential rates, (d) to sell HVACR equipment to customers other than those metered and billed on residential rates except where such sale is an incidental part of providing other energy services or providing traditional cooperative activities, (e) to sell or distribute propane or fuel oil; sell, install or service propane or fuel oil equipment; or maintain or buy an inventory of propane or fuel oil equipment for resale, or (f) to serve as a coordinator of nonelectric energy services or provide engineering consulting services except when such energy or engineering services are an incidental part of a marketing effort to provide other energy or engineering services or as a part of providing services that are traditional cooperative activities; (ii) provided further, that notwithstanding clause (i), such cooperative may engage within its certificated service territory in any of the activities enumerated in clause (i) that (a) have received State Corporation Commission approval prior to February 1, 1998, (b) such cooperative is ordered or required to undertake by any jurisdictional court or regulatory authority, (c) were lawfully undertaken prior to February 1, 1998, (d) are specifically permitted by statute, or (e) are undertaken by any other regulated public service company or its unregulated affiliate within such cooperative's certificated service territory; and (iii) also provided that such cooperative or its affiliate may not undertake such activities as are prohibited by clause (i) within the certificated service territory of another public service company unless such activities are undertaken by such public service company or its unregulated affiliate within such cooperative's certificated service territory. In addition, such cooperative may establish one or more subsidiaries to engage in any other business activities not prohibited by law; notwithstanding the foregoing, no such subsidiary may engage in any business activities that the cooperatives are prohibited from engaging in under this section. *For purposes of determining whether a cooperative is formed not for pecuniary profit, the establishment of one or more affiliates thereof on a for-profit basis shall not disqualify such entity from being formed as a cooperative pursuant to this article.*

B. *Nothing in this article shall be construed to authorize a cooperative formed pursuant to this article, or any affiliate thereof, to engage, within either the cooperative's certificated service territory or in the certificated service territory of another public service company, in the sale of products, the provision of services, or other business activity, except for regulated electric utility services, if such business activity is currently provided or could be provided by any person other than the cooperative or its affiliate unless the Commission determines that the cooperative or its affiliate undertakes to conduct such business activity on a basis that is not more favorable and is not less burdensome than the basis under which any person other than the cooperative or its affiliate is obligated to conduct such business activity. In determining whether the basis under which a cooperative or its affiliate undertakes to conduct a business activity is not more favorable or less burdensome than the basis under which any such other persons are obligated to conduct such business activity, the Commission shall consider, among such other criteria as it deems relevant, the income tax liabilities and financing opportunities of*

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HB797

60 *cooperatives and their affiliates under applicable law.*

61 § 56-231.30. Rights and liabilities of members.

62 A cooperative shall issue to its members certificates of membership and each member shall be
63 entitled to only one vote at the meetings of the members of the cooperative. The liability of each
64 member shall be limited to the unpaid portion of his membership fee or subscription to capital stock,
65 and any unpaid bills for utility services or other services, commodities or merchandise purchased from
66 the cooperative. The equity of members of a nonstock cooperative shall be set by the board and be in
67 proportion to the revenue or patronage capital paid to the cooperative. A cooperative shall be operated
68 on a not-for-profit basis, *with the exception of for-profit affiliates*, for the mutual benefit of the
69 members. The bylaws of a cooperative or its contract with the members shall contain such provisions
70 relative to the disposition of revenues and receipts as may be necessary and appropriate to establish and
71 maintain its nonprofit and cooperative character.

72 § 56-231.34:1. Separation of regulated and unregulated businesses.

73 A. Any business of a cooperative that is not a regulated utility service shall be conducted solely by
74 one or more *for-profit* affiliates of such cooperative. No such affiliates, formed to engage in any
75 business that is not a regulated utility service, shall engage in regulated utility services.

76 B. The Commission shall promulgate rules and regulations, governing the conduct of the
77 cooperatives, to promote effective and fair competition between (i) affiliates of cooperatives that are
78 engaged in business activities which are not regulated utility services and (ii) other persons engaged in
79 the same or similar businesses. The rules and regulations shall be effective by July 1, 2000, and shall
80 include provisions:

- 81 1. Prohibiting cost-shifting or cross-subsidies between a cooperative and its affiliates;
- 82 2. Prohibiting anticompetitive behavior or self-dealing between a cooperative and its affiliates;
- 83 3. Prohibiting a cooperative from engaging in discriminatory behavior towards nonaffiliated entities;
- 84 and

- 85 4. Establishing codes of conduct detailing permissible relations between a cooperative and its
86 affiliates. In establishing such codes, the Commission shall consider, among other things, whether and, if
87 so, under what circumstances and conditions (i) a cooperative may provide its affiliates with customer
88 lists or other customer information, sales leads, procurement advice, joint promotions, and access to
89 billing or mailing systems unless such information or services are made available to third parties under
90 the same terms and conditions, (ii) the cooperative's name, logos or trademarks may be used in
91 promotional, advertising or sales activities conducted by its affiliates, and (iii) the cooperative's vehicles,
92 equipment, office space and employees may be used by its affiliates.

93 C. Nothing in this article shall be deemed to abrogate or modify the Commission's authority under
94 Chapter 4 (§ 56-76 et seq.) of Title 56.

95 § 56-231.39. Organization and purpose.

96 ~~Any~~ A. *Subject to § 56-231.50:1., any* utility consumer service cooperative or utility aggregation
97 cooperative may form a cooperative in accordance with this article, either stock or nonstock, not for
98 pecuniary profit, *with the exception of for-profit affiliates*, for the purpose of purchasing, generating or
99 transmitting energy products and services for sale or resale, operating or participating in an independent
100 system operator, regional transmission entity, regional power exchange, or both, and any other lawful
101 purpose, consistent with sound business principles and prudent management practices; (i) provided,
102 however, that within the certificated service territory of any member distribution cooperative that existed
103 as of January 1, 1999, no such cooperative shall, prior to July 1, 2000, undertake or initiate any new
104 program (a) to buy or maintain an inventory of HVACR equipment or household appliances, (b) to
105 install or service any such equipment or household appliances for customers, unless such service is not
106 provided by the cooperative but by a third party individual, firm or corporation licensed to perform such
107 service, (c) to sell HVACR equipment or household appliances to customers who are metered and billed
108 on residential rates, (d) to sell HVACR equipment to customers other than those metered and billed on
109 residential rates except where such sale is an incidental part of providing other energy services or
110 providing traditional cooperative activities, (e) to sell or distribute propane or fuel oil; sell, install or
111 service propane or fuel oil equipment; or maintain or buy an inventory of propane or fuel oil equipment
112 for resale, or (f) to serve as a coordinator of nonelectric energy services or provide engineering
113 consulting services except when such energy or engineering services are an incidental part of a
114 marketing effort to provide other energy or engineering services or as a part of providing services that
115 are traditional cooperative activities; (ii) provided further, that notwithstanding clause (i), such
116 cooperative may, within the certificated service territory of a specific distribution cooperative that
117 existed as of January 1, 1999, and then only to the extent that such specific distribution cooperative
118 could lawfully do so, engage in any of the activities enumerated in clause (i) that (a) have received State
119 Corporation Commission approval prior to February 1, 1998, (b) such cooperative is ordered or required
120 to undertake by any jurisdictional court or regulatory authority, (c) were lawfully undertaken prior to
121 February 1, 1998, (d) are specifically permitted by statute, or (e) are undertaken by any other regulated

public service company or its unregulated affiliate within such distribution cooperative's certificated service territory; and (iii) also provided that such cooperative or its affiliate may not undertake such activities as are prohibited by clause (i) within the certificated service territory of another public service company unless such activities are undertaken by such public service company or its unregulated affiliate within the certificated service territory of a specific distribution cooperative existing as of January 1, 1999, and the certificated service territories of the public service company and the specific distribution cooperative overlap. In addition, such cooperative may establish one or more subsidiaries to engage in any other business activities not prohibited by law. Notwithstanding the foregoing, no such subsidiary may engage in any business activities that the cooperatives are prohibited from engaging in under this section. *For purposes of determining whether a cooperative is formed not for pecuniary profit, the establishment of one or more affiliates thereof on a for-profit basis shall not disqualify such entity from being formed as a cooperative pursuant to this article.*

B. Nothing in this article shall be construed to authorize a cooperative formed pursuant to this article, or any affiliate thereof, to engage, within either the cooperative's certificated service territory or in the certificated service territory of another public service company, in the sale of products, the provision of services, or other business activity, except for regulated electric utility services, if such business activity is currently provided or could be provided by any person other than the cooperative or its affiliate unless the Commission determines that the cooperative or its affiliate undertakes to conduct such business activity on a basis that is not more favorable and is not less burdensome than the basis under which any person other than the cooperative or its affiliate is obligated to conduct such business activity. In determining whether the basis under which a cooperative or its affiliate undertakes to conduct a business activity is not more favorable or less burdensome than the basis under which any such other persons are obligated to conduct such business activity, the Commission shall consider, among such other criteria as it deems relevant, the income tax liabilities and financing opportunities of cooperatives and their affiliates under applicable law.

§ 56-231.50:1. Separation of regulated and unregulated businesses.

A. Any business of a cooperative that is not a regulated utility service shall be conducted solely by one or more *for-profit* affiliates of such cooperative. No such affiliates, formed to engage in any business that is not a regulated utility service, shall engage in regulated utility services.

B. The Commission shall promulgate rules and regulations to promote effective and fair competition between (i) *for-profit* affiliates of cooperatives that are engaged in business activities which are not regulated utility services and (ii) other persons engaged in the same or similar businesses. The rules and regulations shall be effective by July 1, 2000, and shall include provisions:

1. Prohibiting cost-shifting or cross-subsidies between a cooperative and its affiliates;
2. Prohibiting anticompetitive behavior or self-dealing between a cooperative and its affiliates;
3. Prohibiting a cooperative from engaging in discriminatory behavior towards nonaffiliated entities;

and

4. Establishing codes of conduct detailing permissible relations between a cooperative and its affiliates. In establishing such codes, the Commission shall consider, among other things, whether and, if so, under what circumstances and conditions (i) a cooperative may provide its affiliates with customer lists or other customer information, sales leads, procurement advice, joint promotions, and access to billing or mailing systems unless such information or services are made available to third parties under the same terms and conditions, (ii) the cooperative's name, logos or trademarks may be used in promotional, advertising or sales activities conducted by its affiliates, and (iii) the cooperative's vehicles, equipment, office space and employees may be used by its affiliates.

C. Nothing in this article shall be deemed to abrogate or modify the Commission's authority under Chapter 4 (§ 56-76 et seq.) of this title.