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**HOUSE BILL NO. 564**

Offered January 11, 2012

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*A BILL to amend and reenact § 56-585.1 of the Code of Virginia, relating to incentives for the construction of electric generating facilities using captured landfill gas.*

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Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:****1. That § 56-585.1 of the Code of Virginia is amended and reenacted as follows:**

§ 56-585.1. Generation, distribution, and transmission rates after capped rates terminate or expire.

A. During the first six months of 2009, the Commission shall, after notice and opportunity for hearing, initiate proceedings to review the rates, terms and conditions for the provision of generation, distribution and transmission services of each investor-owned incumbent electric utility. Such proceedings shall be governed by the provisions of Chapter 10 (§ 56-232 et seq.) of this title, except as modified herein. In such proceedings the Commission shall determine fair rates of return on common equity applicable to the generation and distribution services of the utility. In so doing, the Commission may use any methodology to determine such return it finds consistent with the public interest, but such return shall not be set lower than the average of the returns on common equity reported to the Securities and Exchange Commission for the three most recent annual periods for which such data are available by not less than a majority, selected by the Commission as specified in subdivision 2 b, of other investor-owned electric utilities in the peer group of the utility, nor shall the Commission set such return more than 300 basis points higher than such average. The peer group of the utility shall be determined in the manner prescribed in subdivision 2 b. The Commission may increase or decrease such combined rate of return by up to 100 basis points based on the generating plant performance, customer service, and operating efficiency of a utility, as compared to nationally recognized standards determined by the Commission to be appropriate for such purposes. In such a proceeding, the Commission shall determine the rates that the utility may charge until such rates are adjusted. If the Commission finds that the utility's combined rate of return on common equity is more than 50 basis points below the combined rate of return as so determined, it shall be authorized to order increases to the utility's rates necessary to provide the opportunity to fully recover the costs of providing the utility's services and to earn not less than such combined rate of return. If the Commission finds that the utility's combined rate of return on common equity is more than 50 basis points above the combined rate of return as so determined, it shall be authorized either (i) to order reductions to the utility's rates it finds appropriate, provided that the Commission may not order such rate reduction unless it finds that the resulting rates will provide the utility with the opportunity to fully recover its costs of providing its services and to earn not less than the fair rates of return on common equity applicable to the generation and distribution services; or (ii) to direct that 60 percent of the amount of the utility's earnings that were more than 50 basis points above the fair combined rate of return for calendar year 2008 be credited to customers' bills, in which event such credits shall be amortized over a period of six to 12 months, as determined at the discretion of the Commission, following the effective date of the Commission's order and be allocated among customer classes such that the relationship between the specific customer class rates of return to the overall target rate of return will have the same relationship as the last approved allocation of revenues used to design base rates. Commencing in 2011, the Commission, after notice and opportunity for hearing, shall conduct biennial reviews of the rates, terms and conditions for the provision of generation, distribution and transmission services by each investor-owned incumbent electric utility, subject to the following provisions:

1. Rates, terms and conditions for each service shall be reviewed separately on an unbundled basis, and such reviews shall be conducted in a single, combined proceeding. The first such review shall utilize the two successive 12-month test periods ending December 31, 2010. However, the Commission may, in its discretion, elect to stagger its biennial reviews of utilities by utilizing the two successive 12-month test periods ending December 31, 2010, for a Phase I Utility, and utilizing the two successive 12-month test periods ending December 31, 2011, for a Phase II Utility, with subsequent proceedings utilizing the two successive 12-month test periods ending December 31 immediately preceding the year in which such proceeding is conducted. For purposes of this section, a Phase I Utility is an investor-owned incumbent electric utility that was, as of July 1, 1999, not bound by a rate case settlement adopted by the Commission that extended in its application beyond January 1, 2002, and a

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59 Phase II Utility is an investor-owned incumbent electric utility that was bound by such a settlement.

60 2. Subject to the provisions of subdivision 6, fair rates of return on common equity applicable  
61 separately to the generation and distribution services of such utility, and for the two such services  
62 combined, shall be determined by the Commission during each such biennial review, as follows:

63 a. The Commission may use any methodology to determine such return it finds consistent with the  
64 public interest, but such return shall not be set lower than the average of the returns on common equity  
65 reported to the Securities and Exchange Commission for the three most recent annual periods for which  
66 such data are available by not less than a majority, selected by the Commission as specified in  
67 subdivision 2 b, of other investor-owned electric utilities in the peer group of the utility subject to such  
68 biennial review, nor shall the Commission set such return more than 300 basis points higher than such  
69 average.

70 b. In selecting such majority of peer group investor-owned electric utilities, the Commission shall  
71 first remove from such group the two utilities within such group that have the lowest reported returns of  
72 the group, as well as the two utilities within such group that have the highest reported returns of the  
73 group, and the Commission shall then select a majority of the utilities remaining in such peer group. In  
74 its final order regarding such biennial review, the Commission shall identify the utilities in such peer  
75 group it selected for the calculation of such limitation. For purposes of this subdivision, an  
76 investor-owned electric utility shall be deemed part of such peer group if (i) its principal operations are  
77 conducted in the southeastern United States east of the Mississippi River in either the states of West  
78 Virginia or Kentucky or in those states south of Virginia, excluding the state of Tennessee, (ii) it is a  
79 vertically-integrated electric utility providing generation, transmission and distribution services whose  
80 facilities and operations are subject to state public utility regulation in the state where its principal  
81 operations are conducted, (iii) it had a long-term bond rating assigned by Moody's Investors Service of  
82 at least Baa at the end of the most recent test period subject to such biennial review, and (iv) it is not  
83 an affiliate of the utility subject to such biennial review.

84 c. The Commission may increase or decrease such combined rate of return by up to 100 basis points  
85 based on the generating plant performance, customer service, and operating efficiency of a utility, as  
86 compared to nationally recognized standards determined by the Commission to be appropriate for such  
87 purposes, such action being referred to in this section as a Performance Incentive. If the Commission  
88 adopts such Performance Incentive, it shall remain in effect without change until the next biennial  
89 review for such utility is concluded and shall not be modified pursuant to any provision of the  
90 remainder of this subsection.

91 d. In any Current Proceeding, the Commission shall determine whether the Current Return has  
92 increased, on a percentage basis, above the Initial Return by more than the increase, expressed as a  
93 percentage, in the United States Average Consumer Price Index for all items, all urban consumers  
94 (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor, since  
95 the date on which the Commission determined the Initial Return. If so, the Commission may conduct an  
96 additional analysis of whether it is in the public interest to utilize such Current Return for the Current  
97 Proceeding then pending. A finding of whether the Current Return justifies such additional analysis shall  
98 be made without regard to any Performance Incentive adopted by the Commission, or any enhanced rate  
99 of return on common equity awarded pursuant to the provisions of subdivision 6. Such additional  
100 analysis shall include, but not be limited to, a consideration of overall economic conditions, the level of  
101 interest rates and cost of capital with respect to business and industry, in general, as well as electric  
102 utilities, the current level of inflation and the utility's cost of goods and services, the effect on the  
103 utility's ability to provide adequate service and to attract capital if less than the Current Return were  
104 utilized for the Current Proceeding then pending, and such other factors as the Commission may deem  
105 relevant. If, as a result of such analysis, the Commission finds that use of the Current Return for the  
106 Current Proceeding then pending would not be in the public interest, then the lower limit imposed by  
107 subdivision 2 a on the return to be determined by the Commission for such utility shall be calculated,  
108 for that Current Proceeding only, by increasing the Initial Return by a percentage at least equal to the  
109 increase, expressed as a percentage, in the United States Average Consumer Price Index for all items, all  
110 urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States  
111 Department of Labor, since the date on which the Commission determined the Initial Return. For  
112 purposes of this subdivision:

113 "Current Proceeding" means any proceeding conducted under any provisions of this subsection that  
114 require or authorize the Commission to determine a fair combined rate of return on common equity for  
115 a utility and that will be concluded after the date on which the Commission determined the Initial  
116 Return for such utility.

117 "Current Return" means the minimum fair combined rate of return on common equity required for  
118 any Current Proceeding by the limitation regarding a utility's peer group specified in subdivision 2 a.

119 "Initial Return" means the fair combined rate of return on common equity determined for such utility  
120 by the Commission on the first occasion after July 1, 2009, under any provision of this subsection

121 pursuant to the provisions of subdivision 2 a.

122 e. In addition to other considerations, in setting the return on equity within the range allowed by this  
123 section, the Commission shall strive to maintain costs of retail electric energy that are cost competitive  
124 with costs of retail electric energy provided by the other peer group investor-owned electric utilities.

125 f. The determination of such returns, including the determination of whether to adopt a Performance  
126 Incentive and the amount thereof, shall be made by the Commission on a stand-alone basis, and  
127 specifically without regard to any return on common equity or other matters determined with regard to  
128 facilities described in subdivision 6.

129 g. If the combined rate of return on common equity earned by both the generation and distribution  
130 services is no more than 50 basis points above or below the return as so determined, such combined  
131 return shall not be considered either excessive or insufficient, respectively.

132 h. Any amount of a utility's earnings directed by the Commission to be credited to customers' bills  
133 pursuant to this section shall not be considered for the purpose of determining the utility's earnings in  
134 any subsequent biennial review.

135 3. Each such utility shall make a biennial filing by March 31 of every other year, beginning in 2011,  
136 consisting of the schedules contained in the Commission's rules governing utility rate increase  
137 applications; however, if the Commission elects to stagger the dates of the biennial reviews of utilities  
138 as provided in subdivision 1, then Phase I utilities shall commence biennial filings in 2011 and Phase II  
139 utilities shall commence biennial filings in 2012. Such filing shall encompass the two successive  
140 12-month test periods ending December 31 immediately preceding the year in which such proceeding is  
141 conducted, and in every such case the filing for each year shall be identified separately and shall be  
142 segregated from any other year encompassed by the filing. If the Commission determines that rates  
143 should be revised or credits be applied to customers' bills pursuant to subdivision 8 or 9, any rate  
144 adjustment clauses previously implemented pursuant to subdivision 4 or 5 or those related to facilities  
145 utilizing simple-cycle combustion turbines described in subdivision 6, shall be combined with the  
146 utility's costs, revenues and investments until the amounts that are the subject of such rate adjustment  
147 clauses are fully recovered. The Commission shall combine such clauses with the utility's costs, revenues  
148 and investments only after it makes its initial determination with regard to necessary rate revisions or  
149 credits to customers' bills, and the amounts thereof, but after such clauses are combined as herein  
150 specified, they shall thereafter be considered part of the utility's costs, revenues, and investments for the  
151 purposes of future biennial review proceedings.

152 4. The following costs incurred by the utility shall be deemed reasonable and prudent: (i) costs for  
153 transmission services provided to the utility by the regional transmission entity of which the utility is a  
154 member, as determined under applicable rates, terms and conditions approved by the Federal Energy  
155 Regulatory Commission, and (ii) costs charged to the utility that are associated with demand response  
156 programs approved by the Federal Energy Regulatory Commission and administered by the regional  
157 transmission entity of which the utility is a member. Upon petition of a utility at any time after the  
158 expiration or termination of capped rates, but not more than once in any 12-month period, the  
159 Commission shall approve a rate adjustment clause under which such costs, including, without  
160 limitation, costs for transmission service, charges for new and existing transmission facilities,  
161 administrative charges, and ancillary service charges designed to recover transmission costs, shall be  
162 recovered on a timely and current basis from customers. Retail rates to recover these costs shall be  
163 designed using the appropriate billing determinants in the retail rate schedules.

164 5. A utility may at any time, after the expiration or termination of capped rates, but not more than  
165 once in any 12-month period, petition the Commission for approval of one or more rate adjustment  
166 clauses for the timely and current recovery from customers of the following costs:

167 a. Incremental costs described in clause (vi) of subsection B of § 56-582 incurred between July 1,  
168 2004, and the expiration or termination of capped rates, if such utility is, as of July 1, 2007, deferring  
169 such costs consistent with an order of the Commission entered under clause (vi) of subsection B of  
170 § 56-582. The Commission shall approve such a petition allowing the recovery of such costs that  
171 comply with the requirements of clause (vi) of subsection B of § 56-582;

172 b. Projected and actual costs for the utility to design and operate fair and effective peak-shaving  
173 programs. The Commission shall approve such a petition if it finds that the program is in the public  
174 interest; provided that the Commission shall allow the recovery of such costs as it finds are reasonable;

175 c. Projected and actual costs for the utility to design, implement, and operate energy efficiency  
176 programs, including a margin to be recovered on operating expenses, which margin for the purposes of  
177 this section shall be equal to the general rate of return on common equity determined as described in  
178 subdivision A 2 of this section. The Commission shall only approve such a petition if it finds that the  
179 program is in the public interest. As part of such cost recovery, the Commission, if requested by the  
180 utility, shall allow for the recovery of revenue reductions related to energy efficiency programs. The  
181 Commission shall only allow such recovery to the extent that the Commission determines such revenue

182 has not been recovered through margins from incremental off-system sales as defined in § 56-249.6 that  
183 are directly attributable to energy efficiency programs.

184 None of the costs of new energy efficiency programs of an electric utility, including recovery of  
185 revenue reductions, shall be assigned to any customer that has a verifiable history of having used more  
186 than 10 megawatts of demand from a single meter of delivery. Nor shall any of the costs of new energy  
187 efficiency programs of an electric utility, including recovery of revenue reductions, be incurred by any  
188 large general service customer as defined herein that has notified the utility of non-participation in such  
189 energy efficiency program or programs. A large general service customer is a customer that has a  
190 verifiable history of having used more than 500 kilowatts of demand from a single meter of delivery.  
191 Non-participation in energy efficiency programs shall be allowed by the Commission if the large general  
192 service customer has, at the customer's own expense, implemented energy efficiency programs that have  
193 produced or will produce measured and verified results consistent with industry standards and other  
194 regulatory criteria stated in this section. The Commission shall, no later than November 15, 2009,  
195 promulgate rules and regulations to accommodate the process under which such large general service  
196 customers shall file notice for such an exemption and (i) establish the administrative procedures by  
197 which eligible customers will notify the utility and (ii) define the standard criteria that must be satisfied  
198 by an applicant in order to notify the utility. In promulgating such rules and regulations, the  
199 Commission may also specify the timing as to when a utility shall accept and act on such notice, taking  
200 into consideration the utility's integrated resource planning process as well as its administration of  
201 energy efficiency programs that are approved for cost recovery by the Commission. The notice of  
202 non-participation by a large general service customer, to be given by March 1 of a given year, shall be  
203 for the duration of the service life of the customer's energy efficiency program. The Commission on its  
204 own motion may initiate steps necessary to verify such non-participants' achievement of energy  
205 efficiency if the Commission has a body of evidence that the non-participant has knowingly  
206 misrepresented its energy efficiency achievement. A utility shall not charge such large general service  
207 customer, as defined by the Commission, for the costs of installing energy efficiency equipment beyond  
208 what is required to provide electric service and meter such service on the customer's premises if the  
209 customer provides, at the customer's expense, equivalent energy efficiency equipment. In all relevant  
210 proceedings pursuant to this section, the Commission shall take into consideration the goals of economic  
211 development, energy efficiency and environmental protection in the Commonwealth;

212 d. Projected and actual costs of participation in a renewable energy portfolio standard program  
213 pursuant to § 56-585.2 that are not recoverable under subdivision 6. The Commission shall approve such  
214 a petition allowing the recovery of such costs as are provided for in a program approved pursuant to  
215 § 56-585.2; and

216 e. Projected and actual costs of projects that the Commission finds to be necessary to comply with  
217 state or federal environmental laws or regulations applicable to generation facilities used to serve the  
218 utility's native load obligations. The Commission shall approve such a petition if it finds that such costs  
219 are necessary to comply with such environmental laws or regulations. If the Commission determines it  
220 would be just, reasonable, and in the public interest, the Commission may include the enhanced rate of  
221 return on common equity prescribed in subdivision 6 in a rate adjustment clause approved hereunder for  
222 a project whose purpose is to reduce the need for construction of new generation facilities by enabling  
223 the continued operation of existing generation facilities. In the event the Commission includes such  
224 enhanced return in such rate adjustment clause, the project that is the subject of such clause shall be  
225 treated as a facility described in subdivision 6 for the purposes of this section.

226 The Commission shall have the authority to determine the duration or amortization period for any  
227 adjustment clause approved under this subdivision.

228 6. To ensure a reliable and adequate supply of electricity, to meet the utility's projected native load  
229 obligations and to promote economic development, a utility may at any time, after the expiration or  
230 termination of capped rates, petition the Commission for approval of a rate adjustment clause for  
231 recovery on a timely and current basis from customers of the costs of (i) a coal-fueled generation  
232 facility that utilizes Virginia coal and is located in the coalfield region of the Commonwealth, as  
233 described in § 15.2-6002, regardless of whether such facility is located within or without the utility's  
234 service territory, (ii) one or more other generation facilities, or (iii) one or more major unit  
235 modifications of generation facilities; however, such a petition concerning facilities described in clause  
236 (ii) that utilize nuclear power, facilities described in clause (ii) that are coal-fueled and will be built by a  
237 Phase I utility, or facilities described in clause (i) may also be filed before the expiration or termination  
238 of capped rates. A utility that constructs any such facility shall have the right to recover the costs of the  
239 facility, as accrued against income, through its rates, including projected construction work in progress,  
240 and any associated allowance for funds used during construction, planning, development and  
241 construction costs, life-cycle costs, and costs of infrastructure associated therewith, plus, as an incentive  
242 to undertake such projects, an enhanced rate of return on common equity calculated as specified below.  
243 The costs of the facility, other than return on projected construction work in progress and allowance for

funds used during construction, shall not be recovered prior to the date the facility begins commercial operation. Such enhanced rate of return on common equity shall be applied to allowance for funds used during construction and to construction work in progress during the construction phase of the facility and shall thereafter be applied to the entire facility during the first portion of the service life of the facility. The first portion of the service life shall be as specified in the table below; however, the Commission shall determine the duration of the first portion of the service life of any facility, within the range specified in the table below, which determination shall be consistent with the public interest and shall reflect the Commission's determinations regarding how critical the facility may be in meeting the energy needs of the citizens of the Commonwealth and the risks involved in the development of the facility. After the first portion of the service life of the facility is concluded, the utility's general rate of return shall be applied to such facility for the remainder of its service life. As used herein, the service life of the facility shall be deemed to begin on the date the facility begins commercial operation, and such service life shall be deemed equal in years to the life of that facility as used to calculate the utility's depreciation expense. Such enhanced rate of return on common equity shall be calculated by adding the basis points specified in the table below to the utility's general rate of return, and such enhanced rate of return shall apply only to the facility that is the subject of such rate adjustment clause. No change shall be made to any Performance Incentive previously adopted by the Commission in implementing any rate of return under this subdivision. Allowance for funds used during construction shall be calculated for any such facility utilizing the utility's actual capital structure and overall cost of capital, including an enhanced rate of return on common equity as determined pursuant to this subdivision, until such construction work in progress is included in rates. The construction of any facility described in clause (i) is in the public interest, and in determining whether to approve such facility, the Commission shall liberally construe the provisions of this title. The basis points to be added to the utility's general rate of return to calculate the enhanced rate of return on common equity, and the first portion of that facility's service life to which such enhanced rate of return shall be applied, shall vary by type of facility, as specified in the following table:

Type of Generation Facility	Basis Points	First Portion of Service Life
Nuclear-powered	200	Between 12 and 25 years
Carbon capture compatible, clean-coal powered	200	Between 10 and 20 years
Renewable powered, <i>other than</i> <i>landfill gas powered</i>	200	Between 5 and 15 years
Coalbed methane gas powered	150	Between 5 and 15 years
<i>Landfill gas powered</i>	150	<i>Between 5 and 15 years</i>
Conventional coal or combined-cycle combustion turbine	100	Between 10 and 20 years

Generation facilities described in clause (ii) that utilize simple-cycle combustion turbines shall not receive an enhanced rate of return on common equity as described herein, but instead shall receive the utility's general rate of return during the construction phase of the facility and, thereafter, for the entire service life of the facility.

As used in this subdivision, a generation facility is (a) "coalbed methane gas powered" if the facility is fired at least 50 percent by coalbed methane gas, as such term is defined in § 45.1-361.1, produced from wells located in the Commonwealth, and (b) "landfill gas powered" if the facility is fired by methane produced by the anaerobic digestion or decomposition of biodegradable materials in a solid waste management facility licensed by the Waste Management Board. A landfill gas powered facility includes, in addition to the generation facility itself, the equipment used in collecting, drying, treating, and compressing the landfill gas and in transmitting the landfill gas from the solid waste management facility where it is collected to the generation facility where it is combusted.

For purposes of this subdivision, "general rate of return" means the fair combined rate of return on common equity as it is determined by the Commission from time to time for such utility pursuant to subdivision 2. In any proceeding under this subdivision conducted prior to the conclusion of the first biennial review for such utility, the Commission shall determine a general rate of return for such utility in the same manner as it would in a biennial review proceeding.

Notwithstanding any other provision of this subdivision, if the Commission finds during the biennial review conducted for a Phase II utility in 2018 that such utility has not filed applications for all necessary federal and state regulatory approvals to construct one or more nuclear-powered or coal-fueled generation facilities that would add a total capacity of at least 1500 megawatts to the amount of the utility's generating resources as such resources existed on July 1, 2007, or that, if all such approvals have been received, that the utility has not made reasonable and good faith efforts to construct one or more such facilities that will provide such additional total capacity within a reasonable time after obtaining such approvals, then the Commission, if it finds it in the public interest, may reduce on a prospective basis any enhanced rate of return on common equity previously applied to any such facility to no less than the general rate of return for such utility and may apply no less than the utility's general rate of return to any such facility for which the utility seeks approval in the future under this subdivision.

7. Any petition filed pursuant to subdivision 4, 5, or 6 shall be considered by the Commission on a stand-alone basis without regard to the other costs, revenues, investments, or earnings of the utility. Any costs incurred by a utility prior to the filing of such petition, or during the consideration thereof by the Commission, that are proposed for recovery in such petition and that are related to clause (a) of subdivision 5, or that are related to facilities and projects described in clause (i) of subdivision 6, shall be deferred on the books and records of the utility until the Commission's final order in the matter, or until the implementation of any applicable approved rate adjustment clauses, whichever is later. Any costs prudently incurred on or after July 1, 2007, by a utility prior to the filing of such petition, or during the consideration thereof by the Commission, that are proposed for recovery in such petition and that are related to facilities and projects described in clause (ii) of subdivision 6 that utilize nuclear power, or coal-fueled facilities and projects described in clause (ii) of subdivision 6 if such coal-fueled facilities will be built by a Phase I Utility, shall be deferred on the books and records of the utility until the Commission's final order in the matter, or until the implementation of any applicable approved rate adjustment clauses, whichever is later. Any costs prudently incurred after the expiration or termination of capped rates related to other matters described in subdivisions 4, 5 or 6 shall be deferred beginning only upon the expiration or termination of capped rates, provided, however, that no provision of this act shall affect the rights of any parties with respect to the rulings of the Federal Energy Regulatory Commission in PJM Interconnection LLC and Virginia Electric and Power Company, 109 F.E.R.C. P 61,012 (2004). The Commission's final order regarding any petition filed pursuant to subdivision 4, 5 or 6 shall be entered not more than three months, eight months, and nine months, respectively, after the date of filing of such petition. If such petition is approved, the order shall direct that the applicable rate adjustment clause be applied to customers' bills not more than 60 days after the date of the order, or upon the expiration or termination of capped rates, whichever is later.

8. If the Commission determines as a result of such biennial review that:

(i) The utility has, during the test period or periods under review, considered as a whole, earned more than 50 basis points below a fair combined rate of return on both its generation and distribution services, as determined in subdivision 2, without regard to any return on common equity or other matters determined with respect to facilities described in subdivision 6, the Commission shall order increases to the utility's rates necessary to provide the opportunity to fully recover the costs of providing the utility's services and to earn not less than such fair combined rate of return, using the most recently ended 12-month test period as the basis for determining the amount of the rate increase necessary. However, the Commission may not order such rate increase unless it finds that the resulting rates will provide the utility with the opportunity to fully recover its costs of providing its services and to earn not less than a fair combined rate of return on both its generation and distribution services, as determined in subdivision 2, without regard to any return on common equity or other matters determined with respect to facilities described in subdivision 6, using the most recently ended 12-month test period as the basis for determining the permissibility of any rate increase under the standards of this sentence, and the amount thereof;

(ii) The utility has, during the test period or test periods under review, considered as a whole, earned more than 50 basis points above a fair combined rate of return on both its generation and distribution services, as determined in subdivision 2, without regard to any return on common equity or other matters determined with respect to facilities described in subdivision 6, the Commission shall, subject to the provisions of subdivision 9, direct that 60 percent of the amount of such earnings that were more than 50 basis points above such fair combined rate of return for the test period or periods under review, considered as a whole, shall be credited to customers' bills. Any such credits shall be amortized over a period of six to 12 months, as determined at the discretion of the Commission, following the effective date of the Commission's order, and shall be allocated among customer classes such that the relationship between the specific customer class rates of return to the overall target rate of return will have the same relationship as the last approved allocation of revenues used to design base rates; or

(iii) Such biennial review is the second consecutive biennial review in which the utility has, during

the test period or test periods under review, considered as a whole, earned more than 50 basis points above a fair combined rate of return on both its generation and distribution services, as determined in subdivision 2, without regard to any return on common equity or other matter determined with respect to facilities described in subdivision 6, the Commission shall, subject to the provisions of subdivision 9 and in addition to the actions authorized in clause (ii) of this subdivision, also order reductions to the utility's rates it finds appropriate. However, the Commission may not order such rate reduction unless it finds that the resulting rates will provide the utility with the opportunity to fully recover its costs of providing its services and to earn not less than a fair combined rate of return on both its generation and distribution services, as determined in subdivision 2, without regard to any return on common equity or other matters determined with respect to facilities described in subdivision 6, using the most recently ended 12-month test period as the basis for determining the permissibility of any rate reduction under the standards of this sentence, and the amount thereof.

The Commission's final order regarding such biennial review shall be entered not more than eight months after the date of filing, and any revisions in rates or credits so ordered shall take effect not more than 60 days after the date of the order.

9. If, as a result of a biennial review required under this subsection and conducted with respect to any test period or periods under review ending later than December 31, 2010 (or, if the Commission has elected to stagger its biennial reviews of utilities as provided in subdivision 1, under review ending later than December 31, 2010, for a Phase I Utility, or December 31, 2011, for a Phase II Utility), the Commission finds, with respect to such test period or periods considered as a whole, that (i) any utility has, during the test period or periods under review, considered as a whole, earned more than 50 basis points above a fair combined rate of return on both its generation and distribution services, as determined in subdivision 2, without regard to any return on common equity or other matters determined with respect to facilities described in subdivision 6, and (ii) the total aggregate regulated rates of such utility at the end of the most recently-ended 12-month test period exceeded the annual increases in the United States Average Consumer Price Index for all items, all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the United States Department of Labor, compounded annually, when compared to the total aggregate regulated rates of such utility as determined pursuant to the biennial review conducted for the base period, the Commission shall, unless it finds that such action is not in the public interest or that the provisions of clauses (ii) and (iii) of subdivision 8 are more consistent with the public interest, direct that any or all earnings for such test period or periods under review, considered as a whole that were more than 50 basis points above such fair combined rate of return shall be credited to customers' bills, in lieu of the provisions of clauses (ii) and (iii) of subdivision 8. Any such credits shall be amortized and allocated among customer classes in the manner provided by clause (ii) of subdivision 8. For purposes of this subdivision:

"Base period" means (i) the test period ending December 31, 2010 (or, if the Commission has elected to stagger its biennial reviews of utilities as provided in subdivision 1, the test period ending December 31, 2010, for a Phase I Utility, or December 31, 2011, for a Phase II Utility), or (ii) the most recent test period with respect to which credits have been applied to customers' bills under the provisions of this subdivision, whichever is later.

"Total aggregate regulated rates" shall include: (i) fuel tariffs approved pursuant to § 56-249.6, except for any increases in fuel tariffs deferred by the Commission for recovery in periods after December 31, 2010, pursuant to the provisions of clause (ii) of subsection C of § 56-249.6; (ii) rate adjustment clauses implemented pursuant to subdivision 4 or 5; (iii) revisions to the utility's rates pursuant to clause (i) of subdivision 8; (iv) revisions to the utility's rates pursuant to the Commission's rules governing utility rate increase applications, as permitted by subsection B, occurring after July 1, 2009; and (v) base rates in effect as of July 1, 2009.

10. For purposes of this section, the Commission shall regulate the rates, terms and conditions of any utility subject to this section on a stand-alone basis utilizing the actual end-of-test period capital structure and cost of capital of such utility, unless the Commission finds that the debt to equity ratio of such capital structure is unreasonable for such utility, in which case the Commission may utilize a debt to equity ratio that it finds to be reasonable for such utility in determining any rate adjustment pursuant to clauses (i) and (iii) of subdivision 8, and without regard to the cost of capital, capital structure, revenues, expenses or investments of any other entity with which such utility may be affiliated. In particular, and without limitation, the Commission shall determine the federal and state income tax costs for any such utility that is part of a publicly traded, consolidated group as follows: (i) such utility's apportioned state income tax costs shall be calculated according to the applicable statutory rate, as if the utility had not filed a consolidated return with its affiliates, and (ii) such utility's federal income tax costs shall be calculated according to the applicable federal income tax rate and shall exclude any consolidated tax liability or benefit adjustments originating from any taxable income or loss of its affiliates.

427 B. Nothing in this section shall preclude an investor-owned incumbent electric utility from applying  
428 for an increase in rates pursuant to § 56-245 or the Commission's rules governing utility rate increase  
429 applications; however, in any such filing, a fair rate of return on common equity shall be determined  
430 pursuant to subdivision 2. Nothing in this section shall preclude such utility's recovery of fuel and  
431 purchased power costs as provided in § 56-249.6.

432 C. Except as otherwise provided in this section, the Commission shall exercise authority over the  
433 rates, terms and conditions of investor-owned incumbent electric utilities for the provision of generation,  
434 transmission and distribution services to retail customers in the Commonwealth pursuant to the  
435 provisions of Chapter 10 (§ 56-232 et seq.) of this title, including specifically § 56-235.2.

436 D. Nothing in this section shall preclude the Commission from determining, during any proceeding  
437 authorized or required by this section, the reasonableness or prudence of any cost incurred or projected  
438 to be incurred, by a utility in connection with the subject of the proceeding. A determination of the  
439 Commission regarding the reasonableness or prudence of any such cost shall be consistent with the  
440 Commission's authority to determine the reasonableness or prudence of costs in proceedings pursuant to  
441 the provisions of Chapter 10 (§ 56-232 et seq.) of this title. In determining the reasonableness or  
442 prudence of a utility providing energy and capacity to its customers from renewable energy resources,  
443 the Commission shall consider the extent to which such renewable energy resources, whether  
444 utility-owned or by contract, further the objectives of the Commonwealth Energy Policy set forth in  
445 §§ 67-101 and 67-102, and shall also consider whether the costs of such resources is likely to result in  
446 unreasonable increases in rates paid by consumers.

447 E. The Commission shall promulgate such rules and regulations as may be necessary to implement  
448 the provisions of this section.