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SENATE BILL NO. 1492

Offered January 18, 2017

A *BILL to amend the Code of Virginia by adding a section numbered 56-235.11, relating to water utilities; retail supply choice.*

Patron—Stuart

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 56-235.11 as follows:

§ 56-235.11. Retail supply choice for incumbent water utility customers.

A. As used in this section, unless the context requires a different meaning:

"Competitive water supplier" means a licensed competitive water supplier or a political subdivision of the Commonwealth that is authorized under Title 15.2 to provide water utility service within the locality in which an incumbent water utility's certificated service territory is located.

"Incumbent water utility" means a water utility that has been designated as such by the Commission in a proceeding under subsection B.

"Licensed competitive water supplier" means a person that is licensed by the Commission to sell water within the service territory of an incumbent water utility pursuant to subsection I.

"Retail supply choice" means the ability of an incumbent water utility's customers to have direct access to competitive water suppliers.

"Water utility" means an investor-owned public utility authorized to furnish water or water and sewer service within a certificated service territory in the Commonwealth.

B. Upon petition by the governing body of the locality within the jurisdictional boundaries of which a water utility's certificated service territory is located, the Commission shall institute a proceeding to determine whether the rates charged by the water utility to its customers impose an undue hardship on the customers. Rates shall be deemed to impose an undue hardship on customers if the volumetric rates charged to the majority of the water utility's customers have increased by over 100 percent in the five calendar years preceding the filing of the petition. If the Commission finds that the rates charged by the water utility to its customers impose an undue hardship on the customers, the Commission shall enter an order designating the water utility as an incumbent water utility.

C. Each incumbent water utility shall offer to all of the incumbent water utility's customers water supply choice by filing a plan for implementing retail supply choice with the Commission for approval. If an incumbent water utility fails or refuses to file such a plan, the governing body of the locality that filed the petition under subsection B, or any person authorized by Article 1 (§ 8.01-635 et seq.) of Chapter 25 of Title 8.01 to institute such a proceeding, may proceed against the incumbent water utility by a writ of quo warranto, or information in the nature of a writ of quo warranto, in the circuit court having jurisdiction in the locality wherein is located the principal office of the incumbent water utility in the Commonwealth. The provisions of Article 1 of Chapter 25 of Title 8.01 shall be applicable to any such proceeding except as herein otherwise provided and if, in such proceeding, there shall be a judgment of dissolution, the provisions of § 13.1-755 shall apply.

D. The Commission shall accept a plan for implementing retail supply choice submitted pursuant to subsection C within 30 days of filing if it contains, at a minimum:

1. A schedule for implementing retail supply choice for all of its customers;

2. Tariff revisions, including proposed unbundled rates for service, which may utilize a cost allocation and rate design formulated to recover the incumbent water utility's nonwater fixed costs on a nonvolumetric basis, and terms and conditions of service designed to provide nondiscriminatory open access over its transportation system, comparable to the transportation service provided by the incumbent water utility to itself, to allow competitive suppliers to sell water directly to the incumbent water utility's customers. Any proposed unbundling rates shall include an explanation of the methodology used to develop the rates and a calculation of revenues, by customer class, thereby produced;

3. Nonbypassable, competitively neutral annual surcharges for the incumbent water utility to properly allocate and recover from its customers its nonmitigable costs associated with the provision of retail supply choice, including prudently incurred contract obligation costs and transition costs;

4. Tariff provisions to balance the receipts and deliveries of water supplies to retail supply choice customers and allocate the incumbent water utility's water costs so that one class of customers is not subsidized by another class of customers;

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59 5. Tariff provisions requiring the incumbent water utility, at a minimum, to offer competitive water
60 suppliers or retail supply choice customers the right to acquire the incumbent water utility's well
61 capacity in a manner that assures that one class of customers is not subsidized by another class of
62 customers;

63 6. A code of conduct governing the activities and relationships between the incumbent water utility
64 and competitive water suppliers to prevent anticompetitive or discriminatory conduct and the unlawful
65 exercise of market power. Such codes of conduct shall incorporate or be consistent with any rule or
66 guideline established by the Commission; and

67 7. Any other requirement established by Commission rule or regulation.

68 The Commission may, by rule or regulation, impose such additional filing requirements as it deems
69 necessary in the public interest. The Commission may also require an incumbent water utility to
70 continue to serve as a competitive water supplier to its customers after the incumbent water utility's
71 plan becomes effective and under such terms and conditions as are necessary to protect the public
72 interest.

73 E. After the Commission has accepted a filing of a plan, the Commission shall review and approve a
74 plan filed by an incumbent water utility unless it determines, after notice and an opportunity for public
75 hearing, that the plan would:

76 1. Adversely affect the quality, safety, or reliability of water service by the incumbent water utility or
77 the provision of adequate service to the incumbent water utility's customers;

78 2. Result in rates charged by the incumbent water utility that are not just and reasonable rates
79 within the contemplation of § 56-235.2;

80 3. Adversely affect the incumbent water utility's customers not participating in the retail supply
81 choice plan;

82 4. Unreasonably discriminate against one class of the incumbent water utility's customers in favor of
83 another class; or

84 5. Not be in the public interest.

85 F. The Commission shall, after the acceptance of a filing of a retail supply choice plan, approve or
86 disapprove the plan within 120 days. The 120-day period may be extended by Commission order for an
87 additional period not to exceed 60 days. The retail supply choice plan shall be deemed approved if the
88 Commission fails to act within 120 days or any extended period ordered by the Commission. The
89 Commission shall approve a retail supply choice plan filed by an incumbent water utility pursuant to
90 this subsection regardless of whether it has promulgated rules and regulations pursuant to subsection A.
91 The Commission may also modify a plan filed by an incumbent water utility to ensure that it conforms
92 to the provisions of this subsection and is otherwise in the public interest.

93 G. Once a plan becomes effective pursuant to this section, if the Commission determines, after notice
94 and opportunity for hearing, that the plan is causing, or is reasonably likely to cause, the effects set
95 forth in subsection E, it may order revisions to the plan to remove such effects. Any such revisions to
96 the plan will operate prospectively only.

97 H. If, upon application of the governing body of the locality and the greater of either at least 25
98 percent of customers receiving water service from the incumbent water utility or a competitive water
99 supplier or 500 customers receiving water service from the incumbent water utility or a competitive
100 water supplier, it is alleged that the marketplace for retail supply choice customer is not reasonably
101 competitive or results in rates unreasonably in excess of what would otherwise be charged by the
102 incumbent water utility, or if the Commission renders such a determination upon its own motion, then
103 the Commission may, after notice, and opportunity for hearing, terminate the incumbent water utility's
104 retail supply choice program and provide for an orderly return of the retail choice customers to the
105 incumbent water utility's traditional retail water sales service. In such event, the incumbent water utility
106 shall be given the opportunity to acquire, under reasonable and competitive terms and conditions and
107 within a reasonable time period, such water resources as are necessary for it to provide retail water
108 sales service to former retail supply choice customers.

109 I. No person, other than an incumbent water utility or a political subdivision of the Commonwealth
110 that is authorized under Title 15.2 to provide water utility service within the locality in which an
111 incumbent water utility's certificated service territory is located, shall engage in the business of selling
112 water to the customers of an incumbent water utility that has an approved plan implementing retail
113 supply choice unless the person holds a license issued by the Commission pursuant to this subsection.
114 An application for licensure as a competitive water supplier shall be made to the Commission in
115 writing, be verified by oath or affirmation and be in such form and contain such information as the
116 Commission may, by rule or regulation, require. For purposes of this subsection, the Commission shall
117 require an applicant for licensure as a competitive water supplier to demonstrate that it has or will
118 have the means to provide water to customers. A competitive water supplier license shall be issued to
119 any qualified applicant within 45 days of the date of filing such application, authorizing in whole or in
120 part the service covered by the application, unless the Commission determines otherwise for good cause

shown. A competitive water supplier shall not be considered a "public service corporation," "public service company," or a "public utility" and shall not be subject to regulation as such; however, nothing contained herein shall be construed to affect the liability of such a person for any license tax levied pursuant to Article 2 (§ 58.1-2620 et seq.) of Chapter 26 of Title 58.1. No license issued under this subsection shall be transferred without prior Commission approval finding that such transfer is not inconsistent with the public interest. If the Commission determines, after notice and opportunity for public hearing, that a licensed competitive water supplier has failed to comply with the provisions of this section or the Commission's rules, regulations, or orders, the Commission may enjoin, fine, or punish any such failure pursuant to the Commission's authority under this statute and under Title 12.1. The Commission may also suspend or revoke the licensed competitive water supplier's license or take such other action as is necessary to protect the public interest. The Commission shall establish rules and regulations for the implementation of this subsection, provided that:

1. The Commission's rules and regulations shall not govern the rates charged by competitive water suppliers, except that the Commission's rules and regulations may govern the terms and conditions of service of competitive water suppliers to protect the incumbent water utility's customers from commercially unreasonable terms and conditions; and

2. The Commission shall also have the authority to issue rules and regulations governing the marketing practices of competitive water suppliers.

J. No competitive water supplier shall use any deception, fraud, false pretense, misrepresentation, or deceptive or unfair practice in providing or marketing water service. Any person who suffers loss (i) as the result of fraudulent marketing practices, including telemarketing practices, engaged in by any competitive water supplier providing any service made competitive under this section, or of any violation of rules and regulations issued by the Commission or (ii) as the result of any violation of this subsection shall be entitled to initiate an action to recover actual damages, or \$500, whichever is greater. If the trier of fact finds that the violation was willful, it may increase damages to an amount not exceeding three times the actual damages sustained, or \$1,000, whichever is greater. Notwithstanding any other provisions of law to the contrary, in addition to any damages awarded, such person also may be awarded reasonable attorney fees and court costs. The Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may cause an action to be brought in the appropriate circuit court for relief of violations of this subsection. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such person or governmental agency initiating an action pursuant to this section may be awarded reasonable attorney fees and court costs. Any action pursuant to this subsection shall be commenced by persons other than the Commission within two years after its accrual. The cause of action shall accrue as provided in § 8.01-230. However, if the Commission initiates proceedings, or any other governmental agency files suit for violations under this section, the time during which such proceeding or governmental suit and all appeals therefrom are pending shall not be counted as any part of the period within which an action under this section shall be brought. The circuit court may make such additional orders or decrees as may be necessary to restore to any identifiable person any money or property, real, personal, or mixed, tangible or intangible, which may have been acquired from such person by means of any act or practice violative of this subsection, provided that such person shall be identified by order of the court within 180 days from the date of any order permanently enjoining the unlawful act or practice. In any case arising under this subsection, no liability shall be imposed upon any competitive water supplier who shows by a preponderance of the evidence that (a) the act or practice alleged to be in violation of this subsection was an act or practice over which the same had no control or (b) the alleged violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid a violation. However, nothing in this section shall prevent the court from ordering restitution and payment of reasonable attorney fees and court costs to individuals aggrieved as a result of an unintentional violation of this subsection.