

VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

CHAPTER 494

An Act to amend and reenact § 59.1-199 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 56-235.8, relating to gas utilities; retail supply choice; consumer protection.

[S 1105]

Approved March 27, 1999

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-199 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 56-235.8 as follows:

§ 56-235.8. Retail supply choice for natural gas customers.

A. Notwithstanding any provision of law to the contrary, each public utility authorized to furnish natural gas service in Virginia ("gas utility") is authorized to offer to all of its customers not eligible for transportation service under tariffs in effect on the effective date of this section, direct access to gas suppliers ("retail supply choice") by filing a plan for implementing retail supply choice with the State Corporation Commission for approval. The provisions of this section shall not apply to any retail supply choice pilot program in effect on July 1, 1999. The Commission shall accept such a plan for filing within thirty 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 firm and interruptible service (which may utilize a cost allocation and rate design formulated to recover the gas utility's nongas 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 gas utility to itself, to allow competitive suppliers to sell natural gas directly to the gas 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. A nonbypassable, competitively neutral mechanism for the gas utility to recover from its customers its nonmitigable costs prudently incurred to support its merchant obligation and to facilitate retail supply choice, including reasonable contract obligation costs and transition costs. For the purposes of this section, contract obligation costs are costs associated with acquiring, maintaining or terminating interstate and intrastate pipeline and storage capacity contracts, less revenues generated with mitigating such contract obligations, whether by off-system sales, capacity release, pipeline supplier refunds or otherwise; and transition costs are costs incurred by the gas utility associated with educating the public on retail supply choice and redesigning its facilities, operations and systems to permit retail supply choice;*

- 4. Tariff provisions to balance the receipts and deliveries of gas supplies to retail supply choice customers and allocate the gas utility's gas costs so that the retail supply choice customers are not subsidized by nonretail choice customers;*

- 5. Tariff provisions requiring the gas utility, at a minimum, to offer gas suppliers or retail supply choice customers the right to acquire the gas utility's upstream transmission and/or storage capacity;*

- 6. A code of conduct governing the activities and relationships between the gas utility and gas suppliers to prevent anticompetitive or discriminatory conduct and the unlawful exercise of market power. Such codes of conduct shall incorporate or be consistent with any rule or guideline established by the Commission; and*

- 7. Any other requirement established by Commission rule or regulation.*

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

B. The Commission shall review and approve a plan filed by a gas utility unless it determines, after notice and an opportunity for public hearing, that the plan would:

- 1. Adversely affect the safety or reliability of natural gas service by the gas utility or the provision of adequate service to the gas utility's customers;*

- 2. Result in rates charged by the gas utility that are not just and reasonable rates within the contemplation of § 56-235.2 or that are in excess of levels approved by the Commission under § 56-235.6, as the case may be;*

- 3. Adversely affect the gas utility's customers not participating in the retail supply choice plan; or*

- 4. Unreasonably discriminate against one class of the gas utility's customers in favor of another class (provided, however, that a gas utility's recovery of nongas fixed costs on a nonvolumetric basis*

shall not necessarily constitute unreasonable discrimination).

The Commission shall approve a retail supply choice plan filed by a gas utility pursuant to this subsection regardless of whether it has promulgated rules and regulations pursuant to subsection A. The Commission may also modify a plan filed by a gas utility to ensure that it conforms to the provisions of this subsection and is otherwise in the public interest. Plans approved pursuant to this section shall not be placed into effect before July 1, 2000.

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

D. If, upon application of at least twenty-five percent of retail supply choice customers or of 500 retail choice customers, whichever number is lesser, or by the gas utility, it is alleged that the marketplace for retail supply choice customer is not reasonably competitive or results in rates unreasonably in excess of what would otherwise be charged by the gas utility, or if the Commission renders such a determination upon its own motion, then the Commission may, after notice, and opportunity for hearing, terminate the gas utility's retail supply choice program and provide for an orderly return of the retail choice customers to the gas utility's traditional retail natural gas sales service. In such event, the gas utility shall be given the opportunity to acquire, under reasonable and competitive terms and conditions and within a reasonable time period, such upstream transportation and storage capacity as is necessary for it to provide traditional retail natural gas sales service to former retail supply choice customers.

E. Licensure of gas suppliers.

1. No person, other than a gas utility, shall engage in the business of selling natural gas to the residential and small commercial customers of a gas utility that has an approved plan implementing retail supply choice unless such person (for the purpose of this section, "gas supplier") holds a license issued by the Commission. An application for a gas supplier license must be made to the Commission in writing, be verified by oath or affirmation and be in such form and contain such information as the Commission may, by rule or regulation, require. For purposes of this subsection, the Commission shall require a gas supplier to demonstrate that it has the means to provide natural gas to essential human needs customers. A gas supplier license shall be issued to any qualified applicant within forty-five days of the date of filing such application, authorizing in whole or in part the service covered by the application, unless the Commission determines otherwise for good cause shown. A person holding such a license 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 chapter shall be transferred without prior Commission approval as being not inconsistent with the public interest. If the Commission determines, after notice and opportunity for public hearing, that a gas supplier has failed to comply with the provisions of this subsection or the Commission's rules, regulations or orders, the Commission may suspend or revoke the gas supplier's license.

2. The Commission shall establish rules and regulations for the implementation of this subsection, provided that:

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

b. The Commission's rules and regulations shall permit an affiliate of the gas utility to be licensed as a gas supplier and to participate in the gas utility's retail supply choice program under the same terms and conditions as gas suppliers not affiliated with the gas utility.

3. The Commission shall also have the authority to issue rules and regulations governing the marketing practices of gas suppliers.

F. Retail customers' private right of action; marketing practices.

1. No gas supplier shall use any deception, fraud, false pretense, misrepresentation, or any deceptive or unfair practices in providing or marketing gas service.

2. Any person who suffers loss (i) as the result of marketing practices, including telemarketing practices, engaged in by any gas supplier providing any service made competitive under this section, or of any violation of rules and regulations issued by the Commission pursuant to subdivision E 3, or (ii) as the result of any violation of subdivision F 1, 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's fees and court costs.

3. The Attorney General, the attorney for the Commonwealth or the attorney for the city, county or town may cause an action to be brought in the appropriate circuit court for relief of violations

referenced in subdivision F 2.

4. 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's fees and court costs.

5. Any action pursuant to this section shall be commenced 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.

6. 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 subsection F, 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.

7. In any case arising under this subsection, no liability shall be imposed upon any gas supplier who shows by a preponderance of the evidence that (i) the act or practice alleged to be in violation of subdivision 1 of this subsection was an act or practice over which the same had no control or (ii) 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's fees and court costs pursuant to subdivision 4 of this subsection to individuals aggrieved as a result of an unintentional violation of this subsection.

§ 59.1-199. Exclusions.

Nothing in this chapter shall apply to:

A. Any aspect of a consumer transaction which aspect is authorized under laws or regulations of this Commonwealth or the United States, or the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States.

B. Acts done by the publisher, owner, agent or employee of a newspaper, periodical, or radio or television station, or other advertising media such as outdoor advertising and advertising agencies, in the publication or dissemination of an advertisement in violation of § 59.1-200, unless it be proved that such person knew that the advertisement was of a character prohibited by § 59.1-200.

C. Those aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.

D. Banks, savings institutions, credit unions, small loan companies, public service corporations, mortgage lenders as defined in § 6.1-409, broker-dealers as defined in § 13.1-501, *gas suppliers as defined in subsection E of § 56-235.8*, and insurance companies regulated and supervised by the State Corporation Commission or a comparable federal regulating body.

E. Any aspect of a consumer transaction which is subject to the Landlord and Tenant Act, Chapter 13 (§ 55-217 et seq.) of Title 55 or the Virginia Residential Landlord and Tenant Act, Chapter 13.2 (§ 55-248.2 et seq.) of Title 55, unless the act or practice of a landlord constitutes a misrepresentation or fraudulent act or practice under § 59.1-200.

F. Real estate licensees who are licensed under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1.

2. That the Senate Committee on Finance, the House Finance Committee, the Senate Committee on Local Government, and the House Committee on Counties, Cities and Towns shall conduct a joint study of the taxation of gas utilities and natural gas suppliers. In conducting this study, the committees shall seek assistance from (i) representatives of gas utilities, natural gas suppliers, industrial gas customers, and electric cooperatives, (ii) organizations representing localities, (iii) the Virginia State Corporation Commission, and (iv) the Department of Taxation. In formulating their findings and recommendations, the committees shall consider and assess the effect of state and local taxation of gas utilities and natural gas suppliers on the economic development goals and objectives of the Commonwealth. Furthermore, the committees shall formulate and recommend specific statutory language to ensure (i) revenue neutrality for the Commonwealth and its local governments and (ii) that any revisions to the existing regime of local and state taxation of gas utilities and natural gas suppliers do not increase the tax rate applicable to, or tax burdens borne by, gas utilities, natural gas suppliers and gas customers, as of the date of enactment of this legislation. The committees shall submit a report of their findings and recommendations to the General Assembly not later than December 15, 1999.

3. That the provisions of this act will expire July 1, 2000.