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HOUSE BILL NO. 746

House Amendments in [ ] — February 10, 2000

A BILL to amend and reenact §§ 56-231.15, 56-231.18, 56-231.23, 56-231.24, 56-231.25, 56-231.27, 56-231.28, 56-231.30, 56-231.33, 56-231.34:1, 56-231.38, 56-231.40, 56-231.43, 56-231.44, and 56-231.50:1 of the Code of Virginia and to repeal § 56-231.20 of the Code of Virginia, relating to utility consumer services cooperatives and utility aggregation cooperatives.

Patrons—Cantor, Jones, J.C., Kilgore and Plum; Senators: Holland and Stolle

Referred to Committee on Corporations, Insurance and Banking

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-231.15, 56-231.18, 56-231.23, 56-231.24, 56-231.25, 56-231.27, 56-231.28, 56-231.30, 56-231.33, 56-231.34:1, 56-231.38, 56-231.40, 56-231.43, 56-231.44, and 56-231.50:1 of the Code of Virginia are amended and reenacted as follows:

§ 56-231.15. Definitions.

The following terms, whenever used or referred to in this article, shall have the following meanings, unless a different meaning clearly appears from the context:

"Acquire" means and includes construct, or acquire by purchase, lease, devise, gift or the exercise of the power of eminent domain, or by other mode of acquisition.

"Affiliate" means a separate affiliated or subsidiary corporation or other separate legal entity.

"Board" means the board of directors of a cooperative formed under or subject to this article.

"Commission" means the State Corporation Commission of Virginia.

"Cooperative" means a utility consumer services cooperative formed under or subject to this article or a distribution cooperative formed under the former Distribution Cooperatives Act (§ 56-209 et seq.).

"Energy" means and includes any and all forms of energy no matter how or where generated or produced.

"Federal agency" means and includes the United States of America, the President of the United States of America, the Tennessee Valley Authority, the Federal Administrator of the Rural Utility Service, the Southeastern Power Administration, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, the Federal Communications Commission and any and all other authorities, agencies, and instrumentalities of the United States of America, heretofore or hereafter created.

"HVACR" means heating, ventilation, air conditioning and refrigeration.

"Improve" means and includes construct, reconstruct, replace, extend, enlarge, alter, better or repair.

"Law" means any act or statute, general, special or local, of this Commonwealth.

"Member" means and includes each natural person signing the articles of incorporation of a cooperative and each person admitted to membership therein pursuant to law or its bylaws.

"Municipality" means any city or incorporated town of the Commonwealth.

"Obligations" means and includes bonds, interim certificates or receipts, notes, debentures, and all other evidences of indebtedness either issued by, or the payment of which is assumed or contractually undertaken by, a cooperative.

"Patronage capital" includes all amounts received by a ~~distribution~~ cooperative from ~~sale~~ *sales* of electric power *or electric distribution services, or both,* to members in excess of the ~~distribution~~ cooperative's cost of furnishing electric power *or distribution services, or both,* to members *and such other margins as determined by the board of directors*.

"Person" means and includes natural persons, firms, associations, cooperatives, corporations, limited liability companies, business trusts, partnerships, limited liability partnerships and bodies politic.

"Propane or fuel oil equipment" means equipment and related systems to store or use propane or fuel oil products.

"Regulated utility services" means utility services that are subject to regulation as to rates or service by the Commission.

"System" means and includes any plant, works, system, facilities, equipment or properties, or any part or parts thereof, together with all appurtenances thereto, used or useful in connection with the generation, production, transmission or distribution of energy or in connection with other utility services.

"Traditional cooperative activity" means any business, service or activity in which cooperatives in Virginia have traditionally engaged and that is incidental to and substantially related to the electric utility business conducted by a cooperative on or before [~~*January*~~ *July*] *1, 1999, provided that traditional cooperative activity does not include any program (i) to buy or maintain an inventory of*

HVACR equipment or household appliances; (ii) 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; (iii) to sell HVACR equipment or household appliances to customers metered and billed on residential rates; (iv) 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 other traditional cooperative activities; (v) 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 (vi) 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 other traditional cooperative activities.

"Utility services" means any products, services and equipment related to energy, telecommunications, water and sewerage.

§ 56-231.18. Name of other corporations not to include term "electric cooperative" or "utility consumer services cooperative."

The words "electric cooperative" or "utility consumer services cooperative" shall not be used in the corporate name of corporations other than (i) those ~~formed~~ ~~pursuant~~ *subject* to the provisions of this chapter, (ii) nonstock corporations of which cooperatives are members, and (iii) corporations, all of the stock of which is owned by cooperatives.

§ 56-231.23. General powers granted.

Each cooperative formed under this article shall have power to do any and all lawful acts or things including, but not limited to the power:

1. To produce, generate, gather, store, transport, transmit, distribute, buy and sell energy and energy-related products.

2. To sue and be sued.

3. To have a seal and alter the same at pleasure.

4. To acquire, hold and dispose of property, real and personal, tangible and intangible, or interests therein and to pay therefor in cash or property or on credit, and to secure and procure payment of all or any part of the purchase price thereof on such terms and conditions as the board shall determine.

5. To render service and to acquire, own, operate, maintain and improve a system or systems.

6. To accept gifts or grants of money or of property, real or personal, from any person, municipality or federal agency and to accept voluntary or uncompensated services.

7. To sell, lease, mortgage or otherwise encumber or dispose of all or any parts of its property, as hereinafter provided.

8. To contract debts, borrow money and to issue or assume the payment of bonds, and other obligations.

9. To fix, maintain and collect reasonable fees, rents, tolls and other charges for service rendered.

10. To exercise, with respect to its providing regulated utility service, all the powers set forth in § 56-49, including the power of eminent domain as prescribed for other public service corporations by general law.

11. To assist its members and nonmember customers, by loans or otherwise, in the acquisition by them of such installation and wiring, and the obtaining of such machinery, equipment and appliances, as will enable them to secure the greatest benefit from the use of utility services supplied by the cooperative.

12. To issue nonassessable nonvoting common and preferred capital stock *or similar securities* and pay ~~noncumulative~~ dividends thereon.

13. To become a member or stockholder in one or more other cooperatives or corporations created to engage in any business not prohibited by law, including, but not limited to, other types of public service company business.

14. To perform any and all of the foregoing acts and do any and all of the foregoing things under, through or by means of its own officers, agents and employees, or by contracts with any person, federal agency or municipality.

§ 56-231.24. Power to dispose of property.

No cooperative may sell, lease or dispose of ~~any~~ *all or substantially all* of its property (other than property which, in the judgment of the board, is neither necessary nor useful in operating and maintaining the cooperative's system and which in any one year shall not exceed ~~ten~~ *fifty* percent in value of the value of all the property of the cooperative, or merchandise), unless authorized to do so by the votes of at least a two-thirds majority of its members; however, a cooperative (i) may mortgage, finance (including, without limitation, pursuant to a sale and leaseback or lease and leaseback transaction), or otherwise encumber its assets by a vote of at least two-thirds of its board of directors; (ii) may sell or transfer its assets to another cooperative upon the vote of a majority of its members at

any regular or special meeting if the notice of such meeting contains a copy of the terms of the proposed sale or transfer; ~~or~~ (iii) may sell or transfer distribution system facilities to a city or town at any time following the annexation of additional territory pursuant to § 56-265.4:2 by a vote of at least two-thirds of its board of directors*; or (iv) may sell, lease or dispose of its property to an affiliate pursuant to a plan approved by the Commission in accordance with subsection B of § 56-590 by a vote of at least two-thirds of the members of the Board*.

§ 56-231.25. Power to issue obligations.

A cooperative shall have power and is hereby authorized, from time to time, to issue its obligations ~~in anticipation of its revenues~~ for any corporate purpose. Such obligations may be authorized by resolution of the board, and may bear such date or dates, mature at such time or times, ~~not exceeding fifty years from their respective date,~~ bear such interest, be payable at such times, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption, as such resolution may provide. Such obligations may be sold in such manner and upon such terms as the board may determine. Pending the preparation or execution of definitive bonds, or obligations, interim receipts or certificates of temporary bonds may be delivered to the purchaser of such obligations.

§ 56-231.27. Power to purchase its own obligations.

A cooperative ~~shall have power out of any funds available therefor to~~ *may* purchase any obligation issued by it ~~at a price not exceeding the principal amount thereof and accrued interest thereon. All bonds so purchased shall be canceled~~.

§ 56-231.28. Board of directors of cooperatives.

Each cooperative shall have a board of directors of five or more members, which board shall constitute the governing body of the cooperative. *Only members and the officers, directors or employees of any member shall be eligible for election to the board of directors.* The directors, other than those named in the articles of incorporation, shall be elected annually by the members entitled to vote, unless the bylaws provide that, in lieu of electing the whole number of directors annually, the directors shall be divided into two, three or four classes at the first or any subsequent annual meeting. If the bylaws so provide, each class shall be as nearly equal in number as possible, with the term of office of one class to expire every year. If the number of classes changes, then the board of directors shall have authority to determine how directors will be allocated among the new number of classes, provided that no director's term will exceed, without reelection, a number of years equal to the number of classes of directors. The board of directors shall have authority to fix the compensation of directors. The directors shall elect annually from their own number a president of the board or a chairman of the board; and one or more vice presidents of the board, vice-chairmen of the board or both. They may also elect or appoint annually (i) a president of the cooperative, (ii) one or more vice presidents of the cooperative, (iii) a secretary, (iv) a treasurer, and (v) such other officers as the board deems necessary. No person shall hold any office unless that person is a director or employee of the cooperative. The offices of secretary and treasurer may be held by the same person.

§ 56-231.30. Rights and liabilities of members.

A. A cooperative may have one or more classes of members. If the cooperative has more than one class of members, the designation of each class and the qualifications and rights of the members of each class shall be set forth in the bylaws of the cooperative.

B. A cooperative shall issue to its members certificates of membership and each member shall be entitled to only one vote at the meetings of the members of the cooperative. The liability of each member shall be limited to the unpaid portion of his membership fee or subscription to capital stock, and any unpaid bills for utility services or other services, commodities or merchandise purchased from the cooperative, *provided that nothing in this section shall be construed to limit the exposure of any unrefunded patronage capital to the lawful creditors of a cooperative*. The equity of members of a nonstock cooperative shall be set by the board ~~and be in proportion to the revenue or patronage capital paid to the cooperative~~ *in accordance with cooperative principles*. A cooperative shall be operated on a not-for-profit basis for the mutual benefit of the members. The bylaws of a cooperative or its contract with the members shall contain such provisions relative to the disposition of ~~revenues and receipts~~ *margins* as may be necessary and appropriate to establish and maintain its nonprofit and cooperative character.

§ 56-231.33. Adequate service; rates.

Regulated utility services offered by a cooperative shall be reasonably adequate, subject to the regulations of the ~~State Corporation~~ Commission, as provided in § 56-231.34. The charge made by any such cooperative for any regulated utility service rendered or to be rendered, either directly or in connection therewith, shall be nondiscriminatory, reasonable and just, and every discriminatory, unjust or unreasonable charge for such regulated utility service is prohibited and declared unlawful. Reasonable

and just charges for service within the meaning of this section shall be such charges as shall produce sufficient revenue to pay all legal and other necessary expenses incident to the operation of the system, and shall include but not be limited to maintenance cost, operating charges, interest charges on bonds or other obligations, to recover such stranded costs and transition costs as may be authorized in this title, to provide for the liquidation of bonds or other evidences of indebtedness, to provide adequate funds to be used as working capital, as well as reasonable reserves and funds for making replacements and also for the payment of any taxes that may be assessed against such cooperative or its property, it being the intent and purpose hereof that such charges shall produce an income sufficient to maintain such cooperative property in a sound physical and financial condition to render adequate and efficient service *and additional amounts that must be realized by the cooperative to meet the requirement of any rate covenant with respect to coverage of principal of and interest on its debt contained in any indenture, mortgage, or other contract with holders of its debt, provided that any such indenture, mortgage or other contract must have been approved by the Commission pursuant to Chapter 3 (§ 56-55 et seq.) of this title*. Any rate for regulated utility services that is too low to meet the foregoing requirements shall be unlawful.

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

A. ~~Any business of a~~ *No* cooperative that ~~is not~~ *engages in* a regulated utility service shall ~~be conducted solely by~~ *conduct any unregulated business activity, other than traditional cooperative activities, except in or through* one or more affiliates of such cooperative, *provided that a cooperative that provides regulated utility services shall have the right to offer and make unregulated sales of electric power to its members within its certificated service territory*. 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, governing the conduct of the cooperatives, to promote effective and fair competition between (i) 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 ~~Title 56~~ *this title*.

§ 56-231.38. Definitions.

As used in this article:

"Affiliate" means a separate affiliated or subsidiary corporation or other separate legal entity.

"Board" means any board of directors of a cooperative formed under or which becomes subject to this article.

"Commission" means the State Corporation Commission of Virginia.

"Cooperative" means a power supply cooperative formed under the former Power Supply Cooperatives Act (§ 56-231.1 et seq.) or a utility aggregation cooperative formed under this article or which becomes subject to this article.

"Energy" means and includes all energy, regardless of how or where it is generated or produced.

"HVACR" means heating, ventilation, air conditioning and refrigeration.

"Member" means any person that holds any class of membership in a cooperative.

"Obligations" means all evidences of indebtedness issued by or the payment of which is assumed by a cooperative.

"Patronage capital" includes all amounts received by a cooperative from the sale of electric power to members in excess of the cooperative's cost of furnishing electric power to members *and such other margins as determined by the Board*.

"Person" means and includes natural persons, firms, associations, cooperatives, corporations, limited liability companies, business trusts, partnerships, limited liability partnerships and bodies politic.

"Propane or fuel oil equipment" means equipment and related systems to store or use propane or fuel oil products.

"Regulated utility services" means utility services that are subject to regulation as to rates or service by the Commission.

"System" means any plant, works, facility, or property used or useful in connection with the purchase, generation, sale or transmission of energy, utility products and services, or both.

"Traditional cooperative activity" means any business, service or activity in which cooperatives in Virginia have traditionally engaged and that is incidental to and substantially related to the electric utility business conducted by a cooperative on or before [~~*January*~~ *July*] *1, 1999; provided, however, that traditional cooperative activity does not include any program (i) to buy or maintain an inventory of HVACR equipment or household appliances; (ii) 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; (iii) to sell HVACR equipment or household appliances to customers metered and billed on residential rates; (iv) 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 other traditional cooperative activities; (v) 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 (vi) 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 other traditional cooperative activities.*

"Utility services" means any products, services, and equipment related to energy, telecommunications, water and sewerage.

§ 56-231.40. Names.

The words "electric cooperative" or "utility aggregation cooperative" shall not be used in the corporate name of any corporation other than those ~~formed~~ ~~under~~ ~~or~~ subject to this chapter, or their wholly owned subsidiaries.

§ 56-231.43. Powers.

A. Each cooperative formed under this article shall have power to do any and all lawful acts or things, including, but not limited to the power:

1. To purchase, sell, generate, store, transport or transmit energy, energy services, products and equipment.

2. To sue and be sued.

3. To have a seal and alter the same at pleasure.

4. To acquire, hold and dispose of property, real and personal, tangible and intangible, or interests therein and to pay in cash or property or on credit, and to secure and procure payment of all or any part of the purchase price thereof on such terms and conditions as the board shall determine.

5. To render service and to acquire, own, operate, maintain and improve a system or systems.

6. To accept gifts or grants of money or of property, real or personal, and to accept voluntary and uncompensated services.

7. To sell, lease, mortgage or otherwise encumber or dispose of all or any parts of its property.

8. To contract debts, borrow money and to issue or assume the payment of bonds and other obligations.

9. To fix, maintain and collect reasonable fees, rents, tolls and other charges for service rendered.

10. To exercise, with respect to its construction of regulated transmission facilities as a power supply cooperative, all the powers set forth in § 56-49, including the power of eminent domain as prescribed for other public service corporations by general law.

11. To assist its members, by loans or otherwise, in the acquisition by them of energy and electrical, technological and other equipment related to the business of the cooperative.

12. To issue nonassessable nonvoting common and preferred capital stock *or similar securities* and pay ~~noncumulative~~ dividends thereon.

13. To perform any and all of the foregoing acts through or by means of its own officers, agents and employees, or by contract.

B. A cooperative shall have the power and is authorized, from time to time, to issue its obligations ~~in~~ ~~anticipation~~ ~~of~~ ~~its~~ ~~revenues~~ for any corporate purpose.

1. The obligations may be authorized by resolution of the board, and may bear any date or dates, mature at any time or times, bear any interest, be payable at any times, be in any denominations, be in any form, either coupon or registered, carry any registration privileges, be executed in any manner, be payable in any medium of payment, at any place or places, and be subject to any terms of redemption, as provided by the resolution.

2. These obligations may be sold in the manner and upon the terms as the board may determine. Pending the preparation or execution of definitive bonds or obligations, interim receipts or certificates of

temporary bonds may be delivered to the purchaser of such obligations.

C. A cooperative ~~shall have the power, out of any funds available, to~~ *may* purchase any of its own obligations. ~~All obligations so purchased shall be canceled.~~

D. The Virginia Securities Act (§ 13.1-501 et seq.) shall not apply to membership certificates issued by a cooperative or its cooperative affiliates, or subsidiaries organized prior to January 1, 1999.

§ 56-231.44. Board of directors.

A. Each cooperative shall have a board of directors consisting of at least five directors, which shall constitute the governing body of such cooperative. The board, other than those named in the articles of incorporation, shall be elected annually by the members. The bylaws may provide in lieu of electing the whole number of directors annually, that the directors may be divided into classes and that the terms of office of the several classes need not be uniform. Each director shall hold office for the term for which he or she is elected and until his or her successor is elected except in cases of ex officio directors.

The directors shall be elected by the members of the cooperative. At a minimum, there shall be at least one director elected from the membership, officers, directors or employees of each member of the cooperative *that is itself a cooperative subject to any article of this chapter*. Additional directors may be elected from the membership, *from the members*, officers, directors or employees of any member of the cooperative, or from employees of the cooperative. The board of directors shall have the authority to fix the compensation of the directors.

B. The board of directors of a cooperative shall have the power to do all things necessary or incidental in conducting the business of such cooperative, including, but not limited to the power:

1. To adopt and amend bylaws for the management and regulation of the affairs of such cooperative unless otherwise provided in the articles of incorporation or bylaws, subject to the rights of the members to alter or repeal such bylaws. The bylaws of a cooperative may make provisions not inconsistent with law or its articles of incorporation, regulating:

a. The admission, suspension or expulsion of members;

b. The transfer or classification of membership;

c. The fees and dues of members and the termination of membership on nonpayment of dues;

d. The number, times and manner of choosing or electing, qualifications, terms of office, official designations, powers, duties and compensation of its directors and officers;

e. The filling of a vacancy in the board or in any office;

f. The number of board members or member-delegates constituting a quorum at meetings;

g. The date of the annual meeting and the giving of notice thereof and the holding of special meetings and the giving of notice thereof;

h. The terms and conditions upon which such cooperative is to render service to its members;

i. The disposition of capital contributions; and

j. The establishment of classes of membership, the qualifications therefor and the rights and obligations thereof.

2. To appoint agents and employees and to fix their compensation and the compensation of the officers of the cooperative.

3. To execute all instruments.

4. To make its own rules and regulations as to its procedure.

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

A. ~~Any business of a~~ *No* cooperative that ~~is not~~ *engages in* a regulated utility service shall ~~be conducted solely by~~ *conduct any unregulated business activity, other than traditional cooperative activities, except in or through* one or more 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) 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.

2. That § 56-231.20 of the Code of Virginia is repealed.