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## SENATE BILL NO. 93

Offered January 9, 2008

Prefiled December 26, 2007

A BILL to amend and reenact §§ 56-231.24, 56-233.1, 56-234.2, 56-235.2, 56-235.6, 56-249.6, 56-576, and 56-580 of the Code of Virginia and to repeal §§ 56-577, 56-578, 56-579, 56-581 through 56-586, 56-587 through 56-593, and 56-596 of the Code of Virginia, relating to the Virginia Electric Utility Restructuring Act.

Patron—Reynolds

Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:**

1. That §§ 56-231.24, 56-233.1, 56-234.2, 56-235.2, 56-235.6, 56-249.6, 56-576, and 56-580 of the Code of Virginia are amended and reenacted as follows:

§ 56-231.24. Power to dispose of property.

No cooperative may sell, lease or dispose of 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 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.

§ 56-233.1. Public utilities purchasing practices.

Every public utility subject to the biennial review provisions of Title 56 shall use competitive bidding to the extent practicable in its purchasing and construction practices. In addition, all such public utilities shall file with the Commission and keep current a description of its purchasing and construction practices.

§ 56-234.2. Review of rates.

The Commission shall review the rates of any public utility on an annual basis when, in the opinion of the Commission, such annual review is in the public interest; provided that the rates of a public utility subject to § 56-585.1 shall be reviewed in accordance with subsection A of that section.

§ 56-235.2. All rates, tolls, etc., to be just and reasonable to jurisdictional customers; findings and conclusions to be set forth; alternative forms of regulation for electric companies.

A. Any rate, toll, charge or schedule of any public utility operating in this Commonwealth shall be considered to be just and reasonable only if: (1) the public utility has demonstrated that such rates, tolls, charges or schedules in the aggregate provide revenues not in excess of the aggregate actual costs incurred by the public utility in serving customers within the jurisdiction of the Commission, including such normalization for nonrecurring costs and annualized adjustments for future costs as the Commission finds reasonably can be predicted to occur during the rate year, and a fair return on the public utility's rate base used to serve those jurisdictional customers, which return shall be calculated in accordance with § 56-585.1 for utilities subject to such section; (1a) the investor-owned public electric utility has demonstrated that no part of such rates, tolls, charges or schedules includes costs for advertisement, except for advertisements either required by law or rule or regulation, or for advertisements which solely promote the public interest, conservation or more efficient use of energy; and (2) the public utility has demonstrated that such rates, tolls, charges or schedules contain reasonable classifications of customers. Notwithstanding § 56-234, the Commission may approve, either in the context of or apart from a rate proceeding after notice to all affected parties and hearing, special rates, contracts or incentives to individual customers or classes of customers where it finds such measures are in the public interest. Such special charges shall not be limited by the provisions of § 56-235.4. In determining costs of service, the Commission may use the test year method of estimating revenue needs, but shall not consider any adjustments or expenses that are speculative or cannot be predicted with reasonable

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59 *certainty*. In any Commission order establishing a fair and reasonable rate of return for an  
60 investor-owned gas, telephone or electric public utility, the Commission shall set forth the findings of  
61 fact and conclusions of law upon which such order is based.

62 For ratemaking purposes, the Commission shall determine the federal and state income tax costs for  
63 investor-owned water, gas, or electric utility that is part of a publicly-traded, consolidated group as  
64 follows: (i) such utility's apportioned state income tax costs shall be calculated according to the  
65 applicable statutory rate, as if the utility had not filed a consolidated return with its affiliates, and (ii)  
66 such utility's federal income tax costs shall be calculated according to the applicable federal income tax  
67 rate and shall exclude any consolidated tax liability or benefit adjustments originating from any taxable  
68 income or loss of its affiliates.

69 B. Upon application of any public service company furnishing electric service or on the  
70 Commission's own motion, the Commission may approve after notice to all affected parties and hearing,  
71 an alternative form of regulation. Alternatives may include, but are not limited to, the use of price  
72 regulation, ranges of authorized returns, categories of services, price indexing, or other alternative  
73 forms of regulation.

74 C. The Commission shall, before approving special rates, contracts, incentives or other alternative  
75 regulatory plans under ~~subsection~~ subsections A and B, ensure that such action (i) protects the public  
76 interest, (ii) will not unreasonably prejudice or disadvantage any customer or class of customers, and  
77 (iii) will not jeopardize the continuation of reliable electric service.

78 D. After notice and public hearing, the Commission shall issue guidelines for special rates adopted  
79 pursuant to subsection A that will ensure that other customers are not caused to bear increased rates as a  
80 result of such special rates.

81 § 56-235.6. Optional performance-based regulation of certain utilities.

82 A. Notwithstanding any provision of law to the contrary, the Commission may approve a  
83 performance-based ratemaking methodology for any public utility engaged in the business of furnishing  
84 gas service (for the purposes of this section a "gas utility") or electricity service (for the purposes of this  
85 section an "electric utility"), upon application of the gas utility or electric utility, and after such notice  
86 and opportunity for hearing as the Commission may prescribe. For the purposes of this section,  
87 "performance-based ratemaking methodology" shall mean a method of establishing rates and charges that  
88 are in the public interest, and that departs in whole or in part from the cost-of-service methodology set  
89 forth in § 56-235.2.

90 B. The Commission shall approve such performance-based ratemaking methodology if it finds that it:  
91 (i) preserves adequate service to all classes of customers (including transportation-only customers if for  
92 a gas utility); (ii) does not unreasonably prejudice or disadvantage any class of gas utility or electric  
93 utility customers; (iii) provides incentives for improved performance by the gas utility or electric utility  
94 in the conduct of its public duties; (iv) results in rates that are not excessive; and (v) is in the public  
95 interest. Performance-based forms of regulation may include, but not be limited to, fixed or capped base  
96 rates, the use of revenue indexing, price indexing, ranges of authorized return, gas cost indexing for gas  
97 utilities, and innovative utilization of utility-related assets and activities (such as a gas utility's  
98 off-system sales of excess gas supplies and release of upstream pipeline capacity, performance of billing  
99 services for other gas or electricity suppliers, and reduction or elimination of regulatory requirements) in  
100 ways that benefit both the utility and its customers and may include a mechanism for automatic annual  
101 adjustments to revenues or prices to reflect changes in any index adopted for the implementation of such  
102 performance-based form of regulation. In making the findings required by this subsection, the  
103 Commission shall include, but not be limited to, in its considerations: (i) any proposed measures,  
104 including investments in infrastructure, that are reasonably estimated to preserve or improve system  
105 reliability, safety, supply diversity, and gas utility transportation options; and (ii) other customer benefits  
106 that are reasonably estimated to accrue from the gas or electric utility's proposal.

107 C. Each gas utility or electric utility shall have the option to apply for implementation of a  
108 performance-based form of regulation. If the Commission approves the application with modifications,  
109 the gas utility or electric utility may, at its option, withdraw its application and continue to be regulated  
110 under the form of regulation that existed immediately prior to the filing of the application. The  
111 Commission may, after notice and opportunity for hearing, alter, amend or revoke, or authorize a gas  
112 utility or electric utility to discontinue, a performance-based form of regulation previously implemented  
113 under this section if it finds that (i) service to one or more classes of customers has deteriorated, or will  
114 deteriorate, to the point that the public interest will not be served by continuation of the  
115 performance-based form of regulation; (ii) any class of gas utility customer or electric utility customer is  
116 being unreasonably prejudiced or disadvantaged by the performance-based form of regulation; (iii) the  
117 performance-based form of regulation does not, or will not, provide reasonable incentives for improved  
118 performance by a gas utility or electric utility in the conduct of its public duties (which determination  
119 may include, but not be limited to, consideration of whether rates are inadequate to recover a gas  
120 utility's or electric utility's cost of service); (iv) the performance-based form of regulation is resulting in

rates that are excessive compared to a gas utility's or electric utility's cost of service and any benefits that accrue from the performance-based plan; (v) the terms ordered by the Commission in connection with approval of a gas utility's or electric utility's implementation of a performance-based form of regulation have been violated; or (vi) the performance-based form of regulation is no longer in the public interest. Any request by a gas utility or electric utility to discontinue its implementation of a performance-based form of regulation may include application pursuant to this chapter for approval of new rates under the standards of § 56-235.2 for a gas utility or pursuant to § 56-585.1 for an investor-owned incumbent electric utility.

D. The Commission shall use the annual review process established in § 56-234.2 to monitor each performance-based form of regulation approved under this section and to make any annual prospective adjustments to revenues or prices necessary to reflect increases or decreases in any index adopted for the implementation of such performance-based form of regulation.

§ 56-249.6. Recovery of fuel and purchased power costs.

A. 1. Each electric utility that purchases fuel for the generation of electricity or purchases power and that was not, as of July 1, 1999, bound by a rate case settlement adopted by the Commission that extended in its application beyond January 1, 2002, shall submit to the Commission its estimate of fuel costs, including the cost of purchased power, for the 12-month period beginning on the date prescribed by the Commission. Upon investigation of such estimates and hearings in accordance with law, the Commission shall direct each company to place in effect tariff provisions designed to recover the fuel costs determined by the Commission to be appropriate for that period, adjusted for any over-recovery or under-recovery of fuel costs previously incurred.

2. The Commission shall continuously review fuel costs and if it finds that any utility described in subdivision A 1 is in an over-recovery position by more than five percent, or likely to be so, it may reduce the fuel cost tariffs to correct the over-recovery.

B. All fuel costs recovery tariff provisions in effect on January 1, 2004, for any electric utility that purchases fuel for the generation of electricity and that was, as of July 1, 1999, bound by a rate case settlement adopted by the Commission that extended in its application beyond January 1, 2002, shall remain in effect until the later of (i) July 1, 2007 or (ii) the establishment of tariff provisions under subsection C. Any such utility shall continue to report to the Commission annually its actual fuel costs, including the cost of purchased power.

C. Each electric utility described in subsection B shall submit annually to the Commission its estimate of fuel costs, including the cost of purchased power, for successive 12-month periods beginning on July 1, 2007, and each July 1 thereafter. Upon investigation of such estimates and hearings in accordance with law, the Commission shall direct each such utility to place in effect tariff provisions designed to recover the fuel costs determined by the Commission to be appropriate for such periods, adjusted for any over-recovery or under-recovery of fuel costs previously incurred; however, (i) no such adjustment for any over-recovery or under-recovery of fuel costs previously incurred shall be made for any period prior to July 1, 2007, and (ii) the Commission shall order that the deferral portion, if any, of the total increase in fuel tariffs for all classes as determined by the Commission to be appropriate for the 12-month period beginning July 1, 2007, above the fuel tariffs previously existing, shall be deferred without interest and recovered from all classes of customers as follows: (i) in the 12-month period beginning July 1, 2008, that part of the deferral portion of the increase in fuel tariffs that the Commission determines would increase the total rates of the residential class of customers of the utility by four percent over the level of such total rates in existence on June 30, 2008, shall be recovered; (ii) in the 12-month period beginning July 1, 2009, that part of the balance of the deferral portion of the increase in fuel tariffs, if any, that the Commission determines would increase the total rates of the residential class of customers of the utility by four percent over the level of such total rates in existence on June 30, 2009, shall be recovered; and (iii) in the 12-month period beginning July 1, 2010, the entire balance of the deferral portion of the increase in fuel tariffs, if any, shall be recovered. The "deferral portion of the increase in fuel tariffs" means the portion of such increase in fuel tariffs that exceeds the amount of such increase in fuel tariffs that the Commission determines would increase the total rates of the residential class of customers of the utility by more than four percent over the level of such total rates in existence on June 30, 2007.

D. In proceedings under subsections A and C:

1. Energy revenues associated with off-system sales of power shall be credited against fuel factor expenses in an amount equal to the total incremental fuel factor costs incurred in the production and delivery of such sales. In addition, 75 percent of the total annual margins from off-system sales shall be credited against fuel factor expenses; however, the Commission, upon application and after notice and opportunity for hearing, may require that a smaller percentage of such margins be so credited if it finds by clear and convincing evidence that such requirement is in the public interest. The remaining margins from off-system sales shall not be considered in the biennial reviews of electric utilities conducted

pursuant to § 56-585.1. In the event such margins result in a net loss to the electric utility, (i) no charges shall be applied to fuel factor expenses and (ii) any such net losses shall not be considered in the biennial reviews of electric utilities conducted pursuant to § 56-585.1. For purposes of this subsection, "margins from off-system sales" shall mean the total revenues received from off-system sales transactions less the total incremental costs incurred; and *The Commission may, to the extent deemed appropriate, offset against fuel costs and purchased power costs to be recovered the revenues attributable to sales of power pursuant to interconnection agreements with neighboring electric utilities.*

2. ~~The~~*In proceedings under subsections A and C, the Commission shall disallow recovery of any fuel costs that it finds without just cause to be the result of failure of the utility to make every reasonable effort to minimize fuel costs or any decision of the utility resulting in unreasonable fuel costs, giving due regard to reliability of service and the need to maintain reliable sources of supply, economical generation mix, generating experience of comparable facilities, and minimization of the total cost of providing service.*

§ 3. The Commission is authorized to promulgate, in accordance with the provisions of this section, all rules and regulations necessary to allow the recovery by electric utilities of all of their prudently incurred fuel costs under subsections A and C, including the cost of purchased power, as precisely and promptly as possible, with no over-recovery or under-recovery, except as provided in subsection C, in a manner that will tend to assure public confidence and minimize abrupt changes in charges to consumers.

*E. The Commission may dispense with the procedures set forth above for any electric utility if it finds, after notice and hearing, that the electric utility's fuel costs can be reasonably recovered through the rates and charges investigated and established in accordance with other sections of this chapter.*

§ 56-576. Definitions.

As used in this chapter:

"Affiliate" means any person that controls, is controlled by, or is under common control with an electric utility.

"Aggregator" means a person that, as an agent or intermediary, (i) offers to purchase, or purchases, electric energy or (ii) offers to arrange for, or arranges for, the purchase of electric energy, for sale to, or on behalf of, two or more retail customers not controlled by or under common control with such person. The following activities shall not, in and of themselves, make a person an aggregator under this chapter: (i) furnishing legal services to two or more retail customers, suppliers or aggregators; (ii) furnishing educational, informational, or analytical services to two or more retail customers, unless direct or indirect compensation for such services is paid by an aggregator or supplier of electric energy; (iii) furnishing educational, informational, or analytical services to two or more suppliers or aggregators; (iv) providing default service under § 56-585; (v) engaging in activities of a retail electric energy supplier, licensed pursuant to § 56-587, which are authorized by such supplier's license; and (vi) engaging in actions of a retail customer, in common with one or more other such retail customers, to issue a request for proposal or to negotiate a purchase of electric energy for consumption by such retail customers.

"Commission" means the State Corporation Commission.

"Cooperative" means a utility formed under or subject to Chapter 9-1 (§ 56-231.15 et seq.) of this title.

"Covered entity" means a provider in the Commonwealth of an electric service not subject to competition but shall not include default service providers.

"Covered transaction" means an acquisition, merger, or consolidation of, or other transaction involving stock, securities, voting interests or assets by which one or more persons obtains control of a covered entity.

"Customer choice" means the opportunity for a retail customer in the Commonwealth to purchase electric energy from any supplier licensed and seeking to sell electric energy to that customer.

"Distribute," "distributing" or "distribution of" electric energy means the transfer of electric energy through a retail distribution system to a retail customer.

"Distributor" means a person owning, controlling, or operating a retail distribution system to provide electric energy directly to retail customers.

"Electric utility" means any person that generates, transmits, or distributes electric energy for use by retail customers in the Commonwealth, including any investor-owned electric utility, cooperative electric utility, or electric utility owned or operated by a municipality.

"Generate," "generating," or "generation of" electric energy means the production of electric energy.

"Generator" means a person owning, controlling, or operating a facility that produces electric energy for sale.

"Incumbent electric utility" means each electric utility in the Commonwealth that, prior to July 1, 1999, supplied electric energy to retail customers located in an exclusive service territory established by the Commission.

"Independent system operator" means a person that may receive or has received, by transfer pursuant to this chapter, any ownership or control of, or any responsibility to operate, all or part of the

transmission systems in the Commonwealth.

"Municipality" means a city, county, town, authority or other political subdivision of the Commonwealth.

"Period of transition to customer choice" means the period beginning on January 1, 2002, and ending on January 1, 2004, unless otherwise extended by the Commission pursuant to this chapter, during which the Commission and all electric utilities authorized to do business in the Commonwealth shall implement customer choice for retail customers in the Commonwealth.

"Person" means any individual, corporation, partnership, association, company, business, trust, joint venture, or other private legal entity, and the Commonwealth or any municipality.

"Renewable energy" means energy derived from sunlight, wind, falling water, sustainable biomass, energy from waste, wave motion, tides, and geothermal power, and does not include energy derived from coal, oil, natural gas or nuclear power.

"Retail customer" means any person that purchases retail electric energy for its own consumption at one or more metering points or nonmetered points of delivery located in the Commonwealth.

"Retail electric energy" means electric energy sold for ultimate consumption to a retail customer.

"Supplier" means any generator, distributor, aggregator, broker, marketer, or other person who offers to sell or sells electric energy to retail customers and is licensed by the Commission to do so, but it does not mean a generator that produces electric energy exclusively for its own consumption or the consumption of an affiliate.

"Supply" or "supplying" electric energy means the sale of or the offer to sell electric energy to a retail customer.

"Transmission of," "transmit," or "transmitting" electric energy means the transfer of electric energy through the Commonwealth's interconnected transmission grid from a generator to either a distributor or a retail customer.

"Transmission system" means those facilities and equipment that are required to provide for the transmission of electric energy.

§ 56-580. Electrical generation facilities.

A. Subject to the provisions of § 56-585.1, the Commission shall continue to regulate pursuant to this title the distribution of retail electric energy to retail customers in the Commonwealth and, to the extent not prohibited by federal law, the transmission of electric energy in the Commonwealth.

B. The Commission shall continue to regulate, to the extent not prohibited by federal law, the reliability, quality and maintenance by transmitters and distributors of their transmission and retail distribution systems.

C. The Commission shall develop codes of conduct governing the conduct of incumbent electric utilities and affiliates thereof when any such affiliates provide, or control any entity that provides, generation, distribution, or transmission services, to the extent necessary to prevent impairment of competition. Nothing in this chapter shall prevent an incumbent electric utility from offering metering options to its customers.

D. The Commission shall permit the construction and operation of electrical generating facilities in Virginia upon a finding that such generating facility and associated facilities (i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility, (ii) are required by the public convenience and necessity, if a petition for such permit is filed after July 1, 2007, and if they are to be constructed and operated by any regulated utility whose rates are regulated pursuant to § 56-585.1, and (iii) are not otherwise contrary to the public interest. In review of a petition for a certificate to construct and operate a generating facility described in this subsection, the Commission shall give consideration to the effect of the facility and associated facilities on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1. In order to avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and public safety, whether such permit or approval is prior to or after the Commission's decision, shall be deemed to satisfy the requirements of this section with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matters. Nothing in this section shall affect the ability of the Commission to keep the record of a case open. Nothing in this section shall affect any right to appeal such permits or approvals in accordance with applicable law. In the case of a proposed facility located in a region that was designated as of July 1, 2001, as serious nonattainment for the one-hour ozone standard as set forth in the federal Clean Air Act, the Commission shall not issue a decision approving such proposed facility that is conditioned upon

issuance of any environmental permit or approval.

E. Nothing in this section shall impair the distribution service territorial rights of incumbent electric utilities; and incumbent electric utilities shall continue to provide distribution services within their exclusive service territories as established by the Commission. Subject to the provisions of § 56-585.1, the Commission shall continue to exercise its existing authority over the provision of electric distribution services to retail customers in the Commonwealth including, but not limited to, the authority contained in Chapters 10 (§ 56-232 et seq.) and 10.1 (§ 56-265.1 et seq.) of this title.

F. Nothing in this chapter shall impair the exclusive territorial rights of an electric utility owned or operated by a municipality as of July 1, 1999, or by an authority created by a governmental unit exempt from the referendum requirement of § 15.2-5403. Nor shall any provision of this chapter apply to any such electric utility unless (i) that municipality or that authority created by a governmental unit exempt from the referendum requirement of § 15.2-5403 elects to have this chapter apply to that utility or (ii) that utility, directly or indirectly, sells, offers to sell or seeks to sell electric energy to any retail customer eligible to purchase electric energy from any supplier in accordance with § 56-577 if that retail customer is outside the geographic area that was served by such municipality as of July 1, 1999, except (a) any area within the municipality that was served by an incumbent public utility as of that date but was thereafter served by an electric utility owned or operated by a municipality or by an authority created by a governmental unit exempt from the referendum requirement of § 15.2-5403 pursuant to the terms of a franchise agreement between the municipality and the incumbent public utility, or (b) where the geographic area served by an electric utility owned or operated by a municipality is changed pursuant to mutual agreement between the municipality and the affected incumbent public utility in accordance with § 56-265.4:1. If an electric utility owned or operated by a municipality as of July 1, 1999, or by an authority created by a governmental unit exempt from the referendum requirement of § 15.2-5403 is made subject to the provisions of this chapter pursuant to clause (i) or (ii) of this subsection, then in such event the provisions of this chapter applicable to incumbent electric utilities shall also apply to any such utility, mutatis mutandis.

G. The applicability of all provisions of this chapter except § 56-594 to any investor-owned incumbent electric utility supplying electric service to retail customers on January 1, 2003, whose service territory assigned to it by the Commission is located entirely within Dickenson, Lee, Russell, Scott, and Wise Counties shall be suspended effective July 1, 2003, so long as such utility does not provide retail electric services in any other service territory in any jurisdiction to customers who have the right to receive retail electric energy from another supplier. During any such suspension period, the utility's rates shall be (i) its capped rates established pursuant to § 56-582 for the duration of the capped rate period established thereunder, and (ii) determined thereafter by the Commission on the basis of such utility's prudently incurred costs pursuant to Chapter 10 (§ 56-232 et seq.) of this title.

H. B. The expiration date of any certificates granted by the Commission pursuant to subsection D A, for which applications were filed with the Commission prior to July 1, 2002, shall be extended for an additional two years from the expiration date that otherwise would apply.

2. That §§ 56-577, 56-578, 56-579, 56-581 through 56-586, 56-587 through 56-593, and 56-596 of the Code of Virginia are repealed.

3. That nothing in this act shall be deemed to modify or impair the terms, unless otherwise modified by an order of the State Corporation Commission, of any order of the State Corporation Commission approving the divestiture of generation assets.

4. That the capped rates of an electric utility established pursuant to repealed § 56-582 that are in effect on December 31, 2008, shall remain the rates that may be charged by the utility until the rates are changed pursuant to a proceeding pursuant to the provisions of § 56-235.2 of the Code of Virginia.

5. That the provisions of this act shall become effective on January 1, 2009.