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SENATE BILL NO. 1296

Offered January 14, 2009

Prefiled January 14, 2009

A *BILL to amend and reenact § 56-585.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 56-234.2:1 and adding in Title 56 a chapter numbered 26, consisting of sections numbered 56-603 through 56-605, relating to electric utilities; energy efficiency and demand response programs.*

Patrons—Reynolds; Delegate: Armstrong

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 56-585.1 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 56-234.2:1 and adding in Title 56 a chapter numbered 26, consisting of sections numbered 56-603 through 56-605 as follows:

§ 56-234.2:1. Electric utilities to offer real-time rates.

A. The Commission shall adopt regulations pursuant to its rules of practice and procedure that require each public utility providing electric service in the Commonwealth to offer electric service to customers in each customer class under a tariff that utilizes rates that vary in real-time in accordance with changes in the utility's costs of providing electricity throughout each day. Such real-time variable rates shall be offered in a manner that permits customers taking service under such tariff to receive information signals that allow the customers to shift or curtail their usage in response to variations in rates that correspond to changes in the utility's cost of generating or purchasing electric power, as these costs vary as a result of such factors as changes in system demand levels and generation and transmission constraints. Such tariff shall be in addition to any other tariff currently offered by the utility.

B. The Commission shall ensure that any such rate or charge (i) is in the public interest, (ii) will not unreasonably prejudice or disadvantage any customer or class of customers, (iii) will not jeopardize the continuation of reliable electric service, and (iv) does not penalize customers taking service under such tariff for a permissible use of utility services.

C. Within 90 days following the effective date of the regulations adopted pursuant to subsection A, each public utility providing electric service in the Commonwealth shall submit a plan setting forth how the utility will comply with the regulations. Such regulations may require utilities to offer service such tariff initially as a pilot program in limited areas or to a limited number of customers. The Commission shall, after notice and the opportunity for hearing, determine whether a utility's plan complies with the regulations. If the utility's plan complies with such regulations, the utility shall offer electric service at such rates and upon such terms and conditions to eligible customers. Eligible customers shall have the option to purchase electric service under such tariff, but shall not be precluded from receiving electric service under any other approved rate, toll, charge, or schedule.

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

A. During the first six months of 2009, the Commission shall, after notice and opportunity for hearing, initiate proceedings to review the rates, terms and conditions for the provision of generation, distribution and transmission services of each investor-owned incumbent electric utility. Such proceedings shall be governed by the provisions of Chapter 10 (§ 56-232 et seq.) of this title, except as modified herein. In such proceedings the Commission shall determine fair rates of return on common equity applicable to the generation and distribution services of the utility. In so doing, the Commission may use any methodology to determine such return it finds consistent with the public interest, but such return shall not be set lower than the average of the returns on common equity reported to the Securities and Exchange Commission for the three most recent annual periods for which such data are available by not less than a majority, selected by the Commission as specified in subdivision 2 b, of other investor-owned electric utilities in the peer group of the utility, nor shall the Commission set such return more than 300 basis points higher than such average. The peer group of the utility shall be determined in the manner prescribed in subdivision 2 b. The Commission may increase or decrease such combined rate of return by up to 100 basis points based on the generating plant performance, customer service, and operating efficiency of a utility, as compared to nationally recognized standards determined by the Commission to be appropriate for such purposes. In such a proceeding, the Commission shall determine the rates that the utility may charge until such rates are adjusted. If the Commission finds that the utility's combined rate of return on common equity is more than 50 basis points below the combined

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SB1296

59 rate of return as so determined, it shall be authorized to order increases to the utility's rates necessary to
60 provide the opportunity to fully recover the costs of providing the utility's services and to earn not less
61 than such combined rate of return. If the Commission finds that the utility's combined rate of return on
62 common equity is more than 50 basis points above the combined rate of return as so determined, it shall
63 be authorized either (i) to order reductions to the utility's rates it finds appropriate, provided that the
64 Commission may not order such rate reduction unless it finds that the resulting rates will provide the
65 utility with the opportunity to fully recover its costs of providing its services and to earn not less than
66 the fair rates of return on common equity applicable to the generation and distribution services; or (ii)
67 direct that 60 percent of the amount of the utility's earnings that were more than 50 basis points above
68 the fair combined rate of return for calendar year 2008 be credited to customers' bills, in which event
69 such credits shall be amortized over a period of six to 12 months, as determined at the discretion of the
70 Commission, following the effective date of the Commission's order and be allocated among customer
71 classes such that the relationship between the specific customer class rates of return to the overall target
72 rate of return will have the same relationship as the last approved allocation of revenues used to design
73 base rates. Commencing in 2011, the Commission, after notice and opportunity for hearing, shall
74 conduct biennial reviews of the rates, terms and conditions for the provision of generation, distribution
75 and transmission services by each investor-owned incumbent electric utility, subject to the following
76 provisions:

77 1. Rates, terms and conditions for each service shall be reviewed separately on an unbundled basis,
78 and such reviews shall be conducted in a single, combined proceeding. The first such review shall
79 utilize the two successive 12-month test periods ending December 31, 2010. However, the Commission
80 may, in its discretion, elect to stagger its biennial reviews of utilities by utilizing the two successive
81 12-month test periods ending December 31, 2010, for a Phase I Utility, and utilizing the two successive
82 12-month test periods ending December 31, 2011, for a Phase II Utility, with subsequent proceedings
83 utilizing the two successive 12-month test periods ending December 31 immediately preceding the year
84 in which such proceeding is conducted. For purposes of this section, a Phase I Utility is an
85 investor-owned incumbent electric utility that was, as of July 1, 1999, not bound by a rate case
86 settlement adopted by the Commission that extended in its application beyond January 1, 2002, and a
87 Phase II Utility is an investor-owned incumbent electric utility that was bound by such a settlement.

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

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

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

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

119 d. In any Current Proceeding, the Commission shall determine whether the Current Return has
120 increased, on a percentage basis, above the Initial Return by more than the increase, expressed as a

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

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

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

"Initial Return" means the fair combined rate of return on common equity determined for such utility by the Commission on the first occasion after July 1, 2009, under any provision of this subsection pursuant to the provisions of subdivision 2 a.

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

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

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

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

3. Each such utility shall make a biennial filing by March 31 of every other year, beginning in 2011, consisting of the schedules contained in the Commission's rules governing utility rate increase applications (20 VAC 5-200-30); however, if the Commission elects to stagger the dates of the biennial reviews of utilities as provided in subdivision 1, then Phase I utilities shall commence biennial filings in 2011 and Phase II utilities shall commence biennial filings in 2012. Such filing shall encompass the two successive 12-month test periods ending December 31 immediately preceding the year in which such proceeding is conducted, and in every such case the filing for each year shall be identified separately and shall be segregated from any other year encompassed by the filing. If the Commission determines that rates should be revised or credits be applied to customers' bills pursuant to subdivision 8 or 9, any rate adjustment clauses previously implemented pursuant to subdivision 4 or 5 or those related to facilities utilizing simple-cycle combustion turbines described in subdivision 6, shall be combined with the utility's costs, revenues and investments until the amounts that are the subject of such rate adjustment clauses are fully recovered. The Commission shall combine such clauses with the utility's costs, revenues and investments only after it makes its initial determination with regard to necessary rate revisions or credits to customers' bills, and the amounts thereof, but after such clauses are combined as herein specified, they shall thereafter be considered part of the utility's costs, revenues, and investments for the purposes of future biennial review proceedings.

4. The following costs incurred by the utility shall be deemed reasonable and prudent: (i) costs for transmission services provided to the utility by the regional transmission entity of which the utility is a

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

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

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

b. Projected and actual costs of *designing and operating, and providing incentives for the utility to design and operate, fair and effective demand-management, conservation, demand response, energy efficiency, and load management programs. As used in this section, "demand response," "energy efficiency program," and "recoverable costs" have the same meanings ascribed thereto in § 56-603. The costs of a demand response program shall not be recoverable under this subdivision if they are recoverable under subdivision A 4.* The Commission shall approve such a petition if it finds that the program is in the public interest and that the need for the incentives is demonstrated with reasonable certainty; provided that the Commission shall allow the recovery of *recoverable costs and such other costs as it finds are reasonable. Notwithstanding anything to the contrary in this subdivision, the Commission, upon petition of an electric utility, shall approve a petition to allow the electric utility to recover all recoverable costs with respect to demand response and energy efficiency programs instituted after July 1, 2009, as follows:*

(1) *In determining the amount to be allowed, the Commission shall allow electric utilities to capitalize all or a portion of recoverable costs to the extent that those costs are intended to produce future benefits;*

(2) *A utility that implements demand response and energy efficiency programs shall have the right to recover the costs of planning and implementing a program, any associated allowance for funds used during planning and development of the program, costs of equipment and infrastructure associated therewith, and costs of donating, or selling over time without interest, energy efficient appliances and home insulation products to low-income customers, schools, and charitable organizations;*

(3) *The Commission shall include in a rate adjustment clause approved hereunder, as an incentive for the electric utility to undertake demand response and energy efficiency programs, an enhanced rate of return on common equity with respect to capitalized recoverable costs, with the same level of the enhanced rate of return to be allowed with respect to new conventional coal generation facilities under subdivision A 6; and*

(4) *The Commission shall determine the appropriate assignment of costs of new demand response and energy efficiency programs for electric utilities and shall assign the costs of the programs only to the class or classes of customers that directly benefit from the programs;*

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

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

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

6. To ensure a reliable and adequate supply of electricity, to meet the utility's projected native load obligations and to promote economic development, a utility may at any time, after the expiration or termination of capped rates, petition the Commission for approval of a rate adjustment clause for recovery on a timely and current basis from customers of the costs of (i) a coal-fueled generation facility that utilizes Virginia coal and is located in the coalfield region of the Commonwealth, as described in § 15.2-6002, regardless of whether such facility is located within or without the utility's service territory, (ii) one or more other generation facilities, or (iii) one or more major unit modifications of generation facilities; however, such a petition concerning facilities described in clause (ii) that utilize nuclear power, facilities described in clause (ii) that are coal-fueled and will be built by a Phase I utility, or facilities described in clause (i) may also be filed before the expiration or termination of capped rates. A utility that constructs any such facility shall have the right to recover the costs of the facility, as accrued against income, through its rates, including projected construction work in progress, and any associated allowance for funds used during construction, planning, development and construction costs, life-cycle costs, and costs of infrastructure associated therewith, plus, as an incentive to undertake such projects, an enhanced rate of return on common equity calculated as specified below. The costs of the facility, other than return on projected construction work in progress and allowance for funds used during construction, shall not be recovered prior to the date the facility begins commercial operation. Such enhanced rate of return on common equity shall be applied to allowance for funds used during construction and to construction work in progress during the construction phase of the facility and shall thereafter be applied to the entire facility during the first portion of the service life of the facility. The first portion of the service life shall be as specified in the table below; however, the Commission shall determine the duration of the first portion of the service life of any facility, within the range specified in the table below, which determination shall be consistent with the public interest and shall reflect the Commission's determinations regarding how critical the facility may be in meeting the energy needs of the citizens of the Commonwealth and the risks involved in the development of the facility. After the first portion of the service life of the facility is concluded, the utility's general rate of return shall be applied to such facility for the remainder of its service life. As used herein, the service life of the facility shall be deemed to begin on the date the facility begins commercial operation, and such service life shall be deemed equal in years to the life of that facility as used to calculate the utility's depreciation expense. Such enhanced rate of return on common equity shall be calculated by adding the basis points specified in the table below to the utility's general rate of return, and such enhanced rate of return shall apply only to the facility that is the subject of such rate adjustment clause. No change shall be made to any Performance Incentive previously adopted by the Commission in implementing any rate of return under this subdivision. Allowance for funds used during construction shall be calculated for any such facility utilizing the utility's actual capital structure and overall cost of capital, including an enhanced rate of return on common equity as determined pursuant to this subdivision, until such construction work in progress is included in rates. The construction of any facility described in clause (i) is in the public interest, and in determining whether to approve such facility, the Commission shall liberally construe the provisions of this title. The basis points to be added to the utility's general rate of return to calculate the enhanced rate of return on common equity, and the first portion of that facility's service life to which such enhanced rate of return shall be applied, shall vary by type of facility, as specified in the following table:

Type of Generation Facility	Basis Points	First Portion of Service Life
Nuclear-powered	200	Between 12 and 25 years
Carbon capture compatible, clean-coal powered	200	Between 10 and 20 years
Renewable powered	200	Between 5 and 15 years
Conventional coal or combined-cycle combustion turbine	100	Between 10 and 20 years

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

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

Notwithstanding any other provision of this subdivision, if the Commission finds during the biennial review conducted for a Phase II utility in 2018 that such utility has not filed applications for all

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

7. Any petition filed pursuant to subdivision 4, 5 or 6 shall be considered by the Commission on a stand-alone basis without regard to the other costs, revenues, investments, or earnings of the utility. Any costs incurred by a utility prior to the filing of such petition, or during the consideration thereof by the Commission, that are proposed for recovery in such petition and that are related to clause (a) of subdivision 5, or that are related to facilities and projects described in clause (i) of subdivision 6, shall be deferred on the books and records of the utility until the Commission's final order in the matter, or until the implementation of any applicable approved rate adjustment clauses, whichever is later. Any costs prudently incurred on or after July 1, 2007, by a utility prior to the filing of such petition, or during the consideration thereof by the Commission, that are proposed for recovery in such petition and that are related to *demand response or energy efficiency programs implemented on or after July 1, 2009, that are authorized to be treated as conventional coal generation facilities for purposes of determining the incentive to be provided therefor*, facilities and projects described in clause (ii) of subdivision 6 that utilize nuclear power, or coal-fueled facilities and projects described in clause (ii) of subdivision 6 if such coal-fueled facilities will be built by a Phase I Utility, shall be deferred on the books and records of the utility until the Commission's final order in the matter, or until the implementation of any applicable approved rate adjustment clauses, whichever is later. Any costs prudently incurred after the expiration or termination of capped rates related to other matters described in subdivisions 4, 5 or 6 shall be deferred beginning only upon the expiration or termination of capped rates, provided, however, that no provision of this act shall affect the rights of any parties with respect to the rulings of the Federal Energy Regulatory Commission in PJM Interconnection LLC and Virginia Electric and Power Company, 109 F.E.R.C. P 61,012 (2004). The Commission's final order regarding any petition filed pursuant to subdivision 4, 5 or 6 shall be entered not more than three months, eight months, and nine months, respectively, after the date of filing of such petition. If such petition is approved, the order shall direct that the applicable rate adjustment clause be applied to customers' bills not more than 60 days after the date of the order, or upon the expiration or termination of capped rates, whichever is later.

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

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

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

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

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

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

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

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

"Total aggregate regulated rates" shall include: (i) fuel tariffs approved pursuant to § 56-249.6, except for any increases in fuel tariffs deferred by the Commission for recovery in periods after December 31, 2010, pursuant to the provisions of clause (ii) of subsection C of § 56-249.6; (ii) rate adjustment clauses implemented pursuant to subdivision 4 or 5; (iii) revisions to the utility's rates pursuant to clause (i) of subdivision 8; (iv) revisions to the utility's rates pursuant to the Commission's rules governing utility rate increase applications (20 VAC 5-200-30), as permitted by subsection B, occurring after July 1, 2009; and (v) base rates in effect as of July 1, 2009.

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

B. Nothing in this section shall preclude an investor-owned incumbent electric utility from applying for an increase in rates pursuant to § 56-245 or the Commission's rules governing utility rate increase applications (20 VAC 5-200-30); however, in any such filing, a fair rate of return on common equity shall be determined pursuant to subdivision 2. Nothing in this section shall preclude such utility's recovery of fuel and purchased power costs as provided in § 56-249.6.

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

D. Nothing in this section shall preclude the Commission from determining, during any proceeding authorized or required by this section, the reasonableness or prudence of any cost incurred or projected to be incurred, by a utility in connection with the subject of the proceeding. A determination of the Commission regarding the reasonableness or prudence of any such cost shall be consistent with the Commission's authority to determine the reasonableness or prudence of costs in proceedings pursuant to the provisions of Chapter 10 (§ 56-232 et seq.) of this title.

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

CHAPTER 26. ENERGY EFFICIENCY AND DEMAND RESPONSE ACT.

§ 56-603. Definitions.

As used in this chapter, unless the context requires otherwise:

"Combined heat and power system" means a system that uses waste heat to produce electricity or useful, measurable thermal energy or mechanical energy at a retail customer's facility.

"Demand response" means activities, programs, or initiatives undertaken by an electric power supplier or its customers to reduce peak demand by shifting the timing of electricity use from peak to nonpeak demand periods. "Demand side management" includes, but is not limited to, load management, electric system equipment and operating controls, direct load control, and interruptible load.

"Energy efficiency program" means an equipment, physical, or program change implemented after July 1, 2009, that results in the use of less energy to perform the same function and produce the same or a similar outcome. "Energy efficiency program" includes, but is not limited to, energy produced from a combined heat and power system. "Energy efficiency program" does not include demand response.

"Peak demand" means the maximum amount of electric power delivered or required on an electric utility's system at a specific time.

"Recoverable costs" means the incremental portion of the reasonable and prudent costs incurred by a utility in order for the utility to meet the energy efficiency and demand response goals established by this chapter, including all capital costs, including cost of capital and depreciation expenses, administrative costs, implementation costs, incentive payments to program participants, and operating costs. The incremental portion of such costs means the portion of such costs, if any, that exceeds the costs that would reasonably have been incurred by the electric utility in meeting its obligations to serve its retail customers in the absence of the goals established by this chapter, and which costs would not otherwise be recoverable by the utility under this title in the absence of this chapter.

"Retail customer" has the same meaning ascribed to it in § 56-576.

"Utility" means an investor-owned public utility that provides electric energy to retail customers located in an exclusive service territory established by the Commission.

§ 56-604. Energy efficiency and demand response goals for utilities.

A. There is hereby established a goal that by calendar year 2025, each utility shall reduce the consumption of electric energy by its retail customers in the Commonwealth, through its implementation of energy efficiency programs, to a level that is 19 percent less than the quantity of electricity projected by the Commission to be consumed by its retail customers in 2025, which projected level of consumption in 2025 shall be based on actual consumption in 2008 increased at an average annual growth rate between 2008 and 2025 that the Commission finds is reasonable for the utility in the absence of energy efficiency programs.

B. There is hereby established a goal that by calendar year 2025, each utility shall reduce its maximum peak demand at any time during such year, through its implementation of demand response, to a level that is 26 percent less than the maximum amount of peak demand at any time during such year projected by the Commission for 2025, which projected maximum peak demand in 2025 shall be based on the utility's maximum peak demand in 2008 increased at an average annual growth rate between 2008 and 2025 that the Commission finds is reasonable for the electric utility in the absence of demand response.

§ 56-605. Cost recovery.

A utility shall have the right to recover its recoverable costs as provided in § 56-585.1.