

# VIRGINIA ACTS OF ASSEMBLY -- 2013 SESSION

## CHAPTER 2

*An Act to amend and reenact §§ 56-585.1 and 56-585.2 of the Code of Virginia, relating to the regulation of investor-owned electric utilities.*

[H 2261]

Approved February 14, 2013

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

**1. That §§ 56-585.1 and 56-585.2 of the Code of Virginia are amended and reenacted as follows:**

**§ 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.), 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 rate of return as so determined, it shall be authorized to 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 combined rate of return. If the Commission finds that the utility's combined rate of return on common equity is more than 50 basis points above the combined rate of return as so determined, it shall be authorized either (i) to order reductions to the utility's rates it finds appropriate, provided that 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 the fair rates of return on common equity applicable to the generation and distribution services; or (ii) to direct that 60 percent of the amount of the utility's earnings that were more than 50 basis points above the fair combined rate of return for calendar year 2008 be credited to customers' bills, in which event 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 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. Commencing in 2011, the Commission, after notice and opportunity for hearing, shall conduct biennial reviews of the rates, terms and conditions for the provision of generation, distribution and transmission services by each investor-owned incumbent electric utility, subject to the following provisions:

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

2. Subject to the provisions of subdivision 6, fair rates of return on common equity applicable separately to the generation and distribution services of such utility, and for the two such services

combined, shall be determined by the Commission during each such biennial review, as follows:

a. 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 subject to such biennial review, nor shall the Commission set such return more than 300 basis points higher than such average.

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

c. The Commission may, *consistent with its precedent for incumbent electric utilities prior to the enactment of Chapters 888 and 933 of the Acts of Assembly of 2007*, increase or decrease ~~such the utility's~~ 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, such action being referred to in this section as a Performance Incentive. If the Commission adopts such Performance Incentive, it shall remain in effect without change until the next biennial review for such utility is concluded and shall not be modified pursuant to any provision of the remainder of this subsection~~ *the Commission's consideration of the utility's performance.*

d. In any Current Proceeding, the Commission shall determine whether the Current Return has 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 *or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, such return is no more than 70 basis points above or below the return as so determined*, such combined return shall not be considered either excessive or insufficient, respectively. *However, for any test period commencing after December 31, 2012, for a Phase II Utility, and after December 31, 2013, for a Phase I Utility, if the utility has, during the test period or periods under review, earned below the return as so determined, whether or not such combined return is within 70 basis points of the return as so determined, the utility may petition the Commission for approval of an increase in rates in accordance with the provisions of clause (i) of subdivision A 8 as if it had earned more than 70 basis points below a fair combined rate of return, and such proceeding shall otherwise be conducted in accordance with the provisions of this section.*

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; 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. *A Phase I utility shall delay for one year the filing of its biennial review from March 31, 2013, to March 31, 2014, and shall not defer on its books for future recovery any costs incurred during calendar year 2011, other than as provided in subdivision A 7 of this section or § 56-249.6, and its subsequent biennial filing shall be made by March 31, 2016, and every two years thereafter.*

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 for the utility to design and operate fair and effective peak-shaving programs. The Commission shall approve such a petition if it finds that the program is in the public interest; provided that the Commission shall allow the recovery of such costs as it finds are reasonable;

c. Projected and actual costs for the utility to design, implement, and operate energy efficiency programs, including a margin to be recovered on operating expenses, which margin for the purposes of this section shall be equal to the general rate of return on common equity determined as described in subdivision A 2 of this section. The Commission shall only approve such a petition if it finds that the program is in the public interest. As part of such cost recovery, the Commission, if requested by the utility, shall allow for the recovery of revenue reductions related to energy efficiency programs. The Commission shall only allow such recovery to the extent that the Commission determines such revenue has not been recovered through margins from incremental off-system sales as defined in § 56-249.6 that are directly attributable to energy efficiency programs.

None of the costs of new energy efficiency programs of an electric utility, including recovery of revenue reductions, shall be assigned to any customer that has a verifiable history of having used more than 10 megawatts of demand from a single meter of delivery. Nor shall any of the costs of new energy efficiency programs of an electric utility, including recovery of revenue reductions, be incurred by any large general service customer as defined herein that has notified the utility of non-participation in such energy efficiency program or programs. A large general service customer is a customer that has a verifiable history of having used more than 500 kilowatts of demand from a single meter of delivery. Non-participation in energy efficiency programs shall be allowed by the Commission if the large general service customer has, at the customer's own expense, implemented energy efficiency programs that have produced or will produce measured and verified results consistent with industry standards and other regulatory criteria stated in this section. The Commission shall, no later than November 15, 2009, promulgate rules and regulations to accommodate the process under which such large general service customers shall file notice for such an exemption and (i) establish the administrative procedures by which eligible customers will notify the utility and (ii) define the standard criteria that must be satisfied by an applicant in order to notify the utility. In promulgating such rules and regulations, the Commission may also specify the timing as to when a utility shall accept and act on such notice, taking into consideration the utility's integrated resource planning process as well as its administration of energy efficiency programs that are approved for cost recovery by the Commission. The notice of non-participation by a large general service customer, to be given by March 1 of a given year, shall be for the duration of the service life of the customer's energy efficiency program. The Commission on its own motion may initiate steps necessary to verify such non-participants' achievement of energy efficiency if the Commission has a body of evidence that the non-participant has knowingly misrepresented its energy efficiency achievement. A utility shall not charge such large general service customer, as defined by the Commission, for the costs of installing energy efficiency equipment beyond what is required to provide electric service and meter such service on the customer's premises if the customer provides, at the customer's expense, equivalent energy efficiency equipment. In all relevant proceedings pursuant to this section, the Commission shall take into consideration the goals of economic development, energy efficiency and environmental protection in the Commonwealth;

d. 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

e. 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. *A utility seeking approval to construct a generating facility shall demonstrate that it has considered and weighed alternative options, including third-party market alternatives, in its selection process.* 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, other than landfill gas powered	200	Between 5 and 15 years
Coalbed methane gas powered	150	Between 5 and 15 years
Landfill gas powered	200	Between 5 and 15 years
Conventional coal or combined-cycle combustion turbine	100	Between 10 and 20 years

*For generating facilities other than those utilizing nuclear power or those utilizing energy derived from offshore wind, as of July 1, 2013, only those facilities as to which a rate adjustment clause under this subdivision has been previously approved by the Commission, or as to which a petition for approval of such rate adjustment clause was filed with the Commission, on or before January 1, 2013, shall be entitled to the enhanced rate of return on common equity as specified in the above table during the construction phase of the facility and the approved first portion of its service life.*

*For generating facilities within the Commonwealth utilizing nuclear power or those utilizing energy derived from offshore wind projects located in waters off the Commonwealth's Atlantic shoreline, such facilities shall continue to be eligible for an enhanced rate of return on common equity during the construction phase of the facility and the approved first portion of its service life of between 12 and 25 years in the case of a facility utilizing nuclear power and for a service life of between 5 and 15 years in the case of a facility utilizing energy derived from offshore wind, provided, however, that, as of July 1, 2013, the enhanced return for such facilities shall be 100 basis points, which shall be added to the utility's general rate of return as determined under subdivision 2.*

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.

As used in this subdivision, a generation facility is (a) "coalbed methane gas powered" if the facility

is fired at least 50 percent by coalbed methane gas, as such term is defined in § 45.1-361.1, produced from wells located in the Commonwealth, and (b) "landfill gas powered" if the facility is fired by methane or other combustible gas produced by the anaerobic digestion or decomposition of biodegradable materials in a solid waste management facility licensed by the Waste Management Board. A landfill gas powered facility includes, in addition to the generation facility itself, the equipment used in collecting, drying, treating, and compressing the landfill gas and in transmitting the landfill gas from the solid waste management facility where it is collected to the generation facility where it is combusted.

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 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. *In any biennial review proceeding, the following utility generation and distribution costs not proposed for recovery under any other subdivision of this subsection, as recorded per books by the utility for financial reporting purposes and accrued against income, shall be attributed to the test periods under review: costs associated with asset impairments related to early retirement determinations made by the utility prior to December 31, 2012, for utility generation plant; costs associated with severe weather events; and costs associated with natural disasters. Such costs shall be deemed to have been recovered from customers through rates for generation and distribution services in effect during the test periods under review unless such costs, individually or in the aggregate, together with the utility's other costs, revenues, and investments to be recovered through rates for generation and distribution services, result in the utility's earned return on its generation and distribution services for the combined test periods under review to fall more than 50 basis points below the fair combined rate of return authorized under subdivision 2 for such periods or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, to fall more than 70 basis points below the fair combined rate of return authorized under subdivision 2 for such periods. In such cases, the Commission shall, in such biennial review proceeding, authorize deferred recovery of such costs and allow the utility to amortize and recover such deferred costs over future periods as*

determined by the Commission. The aggregate amount of such deferred costs shall not exceed an amount that would, together with the utility's other costs, revenues, and investments to be recovered through rates for generation and distribution services, cause the utility's earned return on its generation and distribution services to exceed the fair rate of return authorized under subdivision 2, less 50 basis points, for the combined test periods under review or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, to exceed the fair rate of return authorized under subdivision 2 less 70 basis points. Nothing in this section shall limit the Commission's authority, pursuant to the provisions of Chapter 10 (§ 56-232 *et seq.*), including specifically § 56-235.2, following the review of combined test period earnings of the utility in a biennial review, for normalization of nonrecurring test period costs and annualized adjustments for future costs, in determining any appropriate increase or decrease in the utility's rates for generation and distribution services pursuant to clause (i) or (iii).

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 or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, more than 70 basis points below a fair combined rate of return on 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~~ *are necessary* to 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 or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, more than 70 basis points above a fair combined rate of return on 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, *or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, that 70 percent of the amount of such earnings that were more than 70 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 or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, more than 70 basis points above a fair combined rate of return on 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 eight months after the date of filing, and any revisions in rates or credits so ordered shall take effect not more than 60 days after the date of the order. *The fair combined rate of return on common equity determined pursuant to subdivision 2 in such biennial review shall apply, for purposes of reviewing the utility's*

*earnings on its rates for generation and distribution services, to the entire two successive 12-month test periods ending December 31 immediately preceding the year of the utility's subsequent biennial review filing under subdivision 3.*

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 or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, more than 70 basis points above a fair combined rate of return on 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, *or, for any test period commencing after December 31, 2012, for a Phase II Utility and after December 31, 2013, for a Phase I Utility, more than 70 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, 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; however, in any such filing, a fair rate of return on common equity shall be determined pursuant to subdivision A 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.), 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.). In determining the reasonableness or prudence of a utility providing energy and capacity to its customers from renewable energy resources, the Commission shall consider the extent to which such renewable energy resources, whether utility-owned or by contract, further the objectives of the Commonwealth Energy Policy set forth in §§ 67-101 and 67-102, and shall also consider whether the costs of such resources is likely to result in unreasonable increases in rates paid by consumers.

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

**§ 56-585.2. Sale of electricity from renewable sources through a renewable energy portfolio standard program.**

A. As used in this section:

"Qualified investment" means an expense incurred in the Commonwealth by a participating utility in conducting, either by itself or in partnership with institutions of higher education in the Commonwealth or with industrial or commercial customers that have established renewable energy research and development programs in the Commonwealth, research and development activities related to renewable or alternative energy sources, which expense (i) is designed to enhance the participating utility's understanding of emerging energy technologies and their potential impact on and value to the utility's system and customers within the Commonwealth; (ii) promotes economic development within the Commonwealth; (iii) supplements customer-driven alternative energy or energy efficiency initiatives; (iv) supplements alternative energy and energy efficiency initiatives at state or local governmental facilities in the Commonwealth; or (v) is designed to mitigate the environmental impacts of renewable energy projects.

"Renewable energy" shall have the same meaning ascribed to it in § 56-576, provided such renewable energy is (i) generated or purchased in the Commonwealth or in the interconnection region of the regional transmission entity of which the participating utility is a member, as it may change from time to time; (ii) generated by a public utility providing electric service in the Commonwealth from a facility in which the public utility owns at least a 49 percent interest and that is located in a control area adjacent to such interconnection region; or (iii) represented by renewable energy certificates. "Renewable energy" shall not include electricity generated from pumped storage, but shall include run-of-river generation from a combined pumped-storage and run-of-river facility.

"Renewable energy certificate" means either (i) a certificate issued by an affiliate of the regional transmission entity of which the participating utility is a member, as it may change from time to time, or any successor to such affiliate, and held or acquired by such utility, that validates the generation of renewable energy by eligible sources in the interconnection region of the regional transmission entity or (ii) a certificate issued by the Commission pursuant to subsection J and held or acquired by a participating utility, that validates a qualified investment made by the participating utility.

"Total electric energy sold in the base year" means total electric energy sold to Virginia jurisdictional retail customers by a participating utility in calendar year 2007, excluding an amount equivalent to the average of the annual percentages of the electric energy that was supplied to such customers from nuclear generating plants for the calendar years 2004 through 2006.

B. Any investor-owned incumbent electric utility may apply to the Commission for approval to participate in a renewable energy portfolio standard program, as defined in this section. The Commission shall approve such application if the applicant demonstrates that it has a reasonable expectation of achieving 12 percent of its base year electric energy sales from renewable energy sources during calendar year 2022, and 15 percent of its base year electric energy sales from renewable energy sources during calendar year 2025, as provided in subsection D.

C. It is in the public interest for utilities *that seek to have a renewable energy portfolio standard program* to achieve the goals set forth in subsection D, such goals being referred to herein as "RPS Goals." Accordingly, the Commission, in addition to providing recovery of incremental RPS program costs pursuant to subsection E, shall increase the fair combined rate of return on common equity for each utility participating in such program by a single Performance Incentive, as defined in subdivision A 2 of § 56-585.1, of 50 basis points whenever the utility attains an RPS Goal established in subsection D. Such Performance Incentive shall first be used in the calculation of a fair combined rate of return for the purposes of the immediately succeeding biennial review conducted pursuant to § 56-585.1 after any such RPS Goal is attained, and shall remain in effect if the utility continues to meet the RPS Goals established in this section through and including the third succeeding biennial review conducted thereafter. Any such Performance Incentive, if implemented, shall be in lieu of any other Performance Incentive reducing or increasing such utility's fair combined rate of return on common equity for the same time periods. However, if the utility receives any other Performance Incentive increasing its fair combined rate of return on common equity by more than 50 basis points, the utility shall be entitled to such other Performance Incentive in lieu of this Performance Incentive during the term of such other

**Performance Incentive.** A utility shall receive double credit toward meeting the renewable energy portfolio standard for energy derived from sunlight, from onshore wind, or from facilities in the Commonwealth fueled primarily by animal waste, and triple credit toward meeting the renewable energy portfolio standard for energy derived from offshore wind.

~~D. To qualify for the Performance Incentive established in subsection C~~ *Regarding any renewable energy portfolio standard program*, the total electric energy sold by a utility to meet the RPS Goals shall be composed of the following amounts of electric energy or renewable thermal energy equivalent from renewable energy sources, as adjusted for any sales volumes lost through operation of the customer choice provisions of subdivision A 3 or A 4 of § 56-577:

RPS Goal I: In calendar year 2010, 4 percent of total electric energy sold in the base year.

RPS Goal II: For calendar years 2011 through 2015, inclusive, an average of 4 percent of total electric energy sold in the base year, and in calendar year 2016, 7 percent of total electric energy sold in the base year.

RPS Goal III: For calendar years 2017 through 2021, inclusive, an average of 7 percent of total electric energy sold in the base year, and in calendar year 2022, 12 percent of total electric energy sold in the base year.

RPS Goal IV: For calendar years 2023 and 2024, inclusive, an average of 12 percent of total electric energy sold in the base year, and in calendar year 2025, 15 percent of total electric energy sold in the base year.

A utility may not apply renewable energy certificates issued pursuant to subsection J to meet more than 20 percent of the sales requirement for the RPS Goal in any year.

A utility may apply renewable energy sales achieved or renewable energy certificates acquired during the periods covered by any such RPS Goal that are in excess of the sales requirement for that RPS Goal to the sales requirements for any future RPS Goal.

E. A utility participating in such program shall have the right to recover all incremental costs incurred for the purpose of such participation in such program, as accrued against income, through rate adjustment clauses as provided in subdivisions A 5 and A 6 of § 56-585.1, including, but not limited to, administrative costs, ancillary costs, capacity costs, costs of energy represented by certificates described in subsection A, and, in the case of construction of renewable energy generation facilities, allowance for funds used during construction until such time as an enhanced rate of return, as determined pursuant to subdivision A 6 of § 56-585.1, on construction work in progress is included in rates, projected construction work in progress, planning, development and construction costs, life-cycle costs, and costs of infrastructure associated therewith, plus an enhanced rate of return, as determined pursuant to subdivision A 6 of § 56-585.1. This subsection shall not apply to qualified investments as provided in subsection K. All incremental costs of the RPS program shall be allocated to and recovered from the utility's customer classes based on the demand created by the class and within the class based on energy used by the individual customer in the class, except that the incremental costs of the RPS program shall not be allocated to or recovered from customers that are served within the large industrial rate classes of the participating utilities and that are served at primary or transmission voltage.

F. A utility participating in such program shall apply towards meeting its RPS Goals any renewable energy from existing renewable energy sources owned by the participating utility or purchased as allowed by contract at no additional cost to customers to the extent feasible. A utility participating in such program shall not apply towards meeting its RPS Goals renewable energy certificates attributable to any renewable energy generated at a renewable energy generation source in operation as of July 1, 2007, that is operated by a person that is served within a utility's large industrial rate class and that is served at primary or transmission voltage, except for those persons providing renewable thermal energy equivalents to the utility. A participating utility shall be required to fulfill any remaining deficit needed to fulfill its RPS Goals from new renewable energy supplies at reasonable cost and in a prudent manner to be determined by the Commission at the time of approval of any application made pursuant to subsection B. A participating utility may sell renewable energy certificates produced at its own generation facilities located in the Commonwealth or, if located outside the Commonwealth, owned by such utility and in operation as of January 1, 2010, or renewable energy certificates acquired as part of a purchase power agreement, to another entity and purchase lower cost renewable energy certificates and the net difference in price between the renewable energy certificates shall be credited to customers. Utilities participating in such program shall collectively, either through the installation of new generating facilities, through retrofit of existing facilities or through purchases of electricity from new facilities located in Virginia, use or cause to be used no more than a total of 1.5 million tons per year of green wood chips, bark, sawdust, a tree or any portion of a tree which is used or can be used for lumber and pulp manufacturing by facilities located in Virginia, towards meeting RPS goals, excluding such fuel used at electric generating facilities using wood as fuel prior to January 1, 2007. A utility with an approved application shall be allocated a portion of the 1.5 million tons per year in proportion to its share of the total electric energy sold in the base year, as defined in subsection A, for all utilities participating in the RPS program. A utility may use in meeting RPS goals, without limitation, the following sustainable biomass and biomass based waste to energy resources: mill residue, except wood

chips, sawdust and bark; pre-commercial soft wood thinning; slash; logging and construction debris; brush; yard waste; shipping crates; dunnage; non-merchantable waste paper; landscape or right-of-way tree trimmings; agricultural and vineyard materials; grain; legumes; sugar; and gas produced from the anaerobic decomposition of animal waste.

G. The Commission shall promulgate such rules and regulations as may be necessary to implement the provisions of this section including a requirement that participants verify whether the RPS goals are met in accordance with this section.

H. Each investor-owned incumbent electric utility shall report to the Commission annually by November 1 identifying:

1. The utility's efforts, if any, to meet the RPS Goals, specifically identifying:
  - a. A list of all states where the purchased or owned renewable energy was generated, specifying the number of megawatt hours or renewable energy certificates originating from each state;
  - b. A list of the decades in which the purchased or owned renewable energy generating units were placed in service, specifying the number of megawatt hours or renewable energy certificates originating from those units; and
  - c. A list of fuel types used to generate the purchased or owned renewable energy, specifying the number of megawatt hours or renewable energy certificates originating from each fuel type;
2. The utility's overall generation of renewable energy; and
3. Advances in renewable generation technology that affect activities described in subdivisions 1 and 2.

I. The Commission shall post on its website the reports submitted by each investor-owned incumbent electric utility pursuant to subsection H.

J. The Commission shall issue to a participating utility a number of renewable energy certificates for qualified investments, upon request by a participating utility, if it finds that an expense satisfies the conditions set forth in this section for a qualified investment, as follows:

1. By March 31 of each year, the participating utility shall provide an analysis, as reasonably determined by a qualified independent broker, of the average for the preceding year of the publicly available prices for Tier 1 renewable energy certificates and Tier 2 renewable energy certificates, validating the generation of renewable energy by eligible sources, that were issued in the interconnection region of the regional transmission entity of which the participating utility is a member;
2. In the same annual analysis provided to the Commission, the participating utility shall divide the amount of the participating utility's qualified investments in the applicable period by the average price determined pursuant to subdivision 1;
3. The number of renewable energy certificates to be issued to the participating utility shall equal the product obtained pursuant to subdivision 2; and
4. The Commission shall review and validate the analysis provided by the participating utility within 90 days of submittal of its analysis to the Commission. If no corrections are made by the Commission, then the analysis shall be deemed correct and the renewable energy certificates shall be deemed issued to the participating utility.

Each renewable energy certificate issued to a participating utility pursuant to this subsection shall represent the equivalent of one megawatt hour of renewable energy sales achieved when applied to an RPS Goal.

K. Qualified investments shall constitute reasonable and prudent operating expenses of a participating utility. Notwithstanding subsection E, a participating utility shall not be authorized to recover the costs associated with qualified investments through rate adjustment clauses as provided in subdivisions A 5 and A 6 of § 56-585.1. In any proceeding conducted pursuant to § 56-585.1 or other provision of this title in which a participating utility seeks recovery of its qualified investments as an operating expense, the participating utility shall not be authorized to earn a return on its qualified investments.

L. A participating utility shall not be eligible for a research and development tax credit pursuant to § 58.1-439.12:08 with regard to any expense incurred or investment made by the participating utility that constitutes a qualified investment pursuant to this section.

**2. That unless otherwise specified, the provisions of this act shall apply to any proceeding filed pursuant to § 56-585.1 or 56-585.2 of the Code of Virginia on or after January 1, 2013.**

**3. That an electric utility's fair combined rate of return on equity as approved by the State Corporation Commission in the utility's last biennial review proceeding prior to January 1, 2013, shall remain in effect for the purposes of reviewing the utility's test period earnings under the provisions of this act in such utility's first biennial review proceeding to occur after January 1, 2013.**

**4. That an emergency exists and this act is in force from its passage.**