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SENATE BILL NO. 1105

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Commerce and Labor
on February 1, 1999)

(Patron Prior to Substitute—Senator Colgan)

A BILL to amend and reenact §§ 58.1-2600, 58.1-3814 and 59.1-199 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 56-235.8, relating to gas utilities; retail supply choice; taxation; consumer protection.

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-2600, 58.1-3814 and 59.1-199 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 56-235.8 as follows:

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

A. Notwithstanding any provision of law to the contrary, each public utility authorized to furnish natural gas service in Virginia ("gas utility") is authorized to offer to all of its customers not eligible for transportation service under tariffs in effect on the effective date of this section, direct access to gas suppliers ("retail supply choice") by filing a plan for implementing retail supply choice with the State Corporation Commission for approval. The provisions of this section shall not apply to any retail supply choice pilot program in effect on July 1, 1999. The Commission shall accept such a plan for filing within thirty days of filing if it contains, at a minimum:

1. A schedule for implementing retail supply choice for all of its customers;

2. Tariff revisions, including proposed unbundled rates for firm and interruptible service (which may utilize a cost allocation and rate design formulated to recover the gas utility's non-gas fixed costs on a non-volumetric basis) and terms and conditions of service designed to provide nondiscriminatory open access over its transportation system, comparable to the transportation service provided by the gas utility to itself, to allow competitive suppliers to sell natural gas directly to the gas utility's customers. Any proposed unbundling rates shall include an explanation of the methodology used to develop the rates and a calculation of revenues, by customer class, thereby produced;

3. A non-bypassable, competitively neutral mechanism for the gas utility to recover from its customers its non-mitigable costs prudently incurred to support its merchant obligation and to facilitate retail supply choice, including reasonable contract obligation costs and transition costs. For the purposes of this section, contract obligation costs are costs associated with acquiring, maintaining or terminating interstate and intrastate pipeline and storage capacity contracts, less revenues generated with mitigating such contract obligations, whether by off-system sales, capacity release, pipeline supplier refunds or otherwise; and transition costs are costs incurred by the gas utility associated with educating the public on retail supply choice and redesigning its facilities, operations and systems to permit retail supply choice;

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

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

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

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

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

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

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

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

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

4. Unreasonably discriminate against one class of the gas utility's customers in favor of another

60 class (provided, however, that a gas utility's recovery of non-gas fixed costs on a non-volumetric basis
61 shall not necessarily constitute unreasonable discrimination).

62 The Commission shall approve a retail supply choice plan filed by a gas utility pursuant to this
63 subsection regardless of whether it has promulgated rules and regulations pursuant to subsection A. The
64 Commission may also modify a plan filed by a gas utility to ensure that it conforms to the provisions of
65 this subsection and is otherwise in the public interest.

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

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

81 E. Licensure of gas suppliers.

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

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

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

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

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

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

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

112 2. Any person who suffers loss (i) as the result of marketing practices, including telemarketing
113 practices, engaged in by any gas supplier providing any service made competitive under this section, or
114 of any violation of rules and regulations issued by the Commission pursuant to subdivision E3, or (ii) as
115 the result of any violation of subdivision F 1, shall be entitled to initiate an action to recover actual
116 damages, or \$500, whichever is greater. If the trier of fact finds that the violation was willful, it may
117 increase damages to an amount not exceeding three times the actual damages sustained, or \$1,000,
118 whichever is greater. Notwithstanding any other provisions of law to the contrary, in addition to any
119 damages awarded, such person also may be awarded reasonable attorney's fees and court costs.

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

referenced in subdivision F 2.

4. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such person or governmental agency initiating an action pursuant to this section may be awarded reasonable attorney's fees and court costs.

5. Any action pursuant to this section shall be commenced within two years after its accrual. The cause of action shall accrue as provided in § 8.01-230. However, if the Commission initiates proceedings, or any other governmental agency files suit for violations under this section, the time during which such proceeding or governmental suit and all appeals therefrom are pending shall not be counted as any part of the period within which an action under this section shall be brought.

6. The circuit court may make such additional orders or decrees as may be necessary to restore to any identifiable person any money or property, real, personal, or mixed, tangible or intangible, which may have been acquired from such person by means of any act or practice violative of subsection F, provided, that such person shall be identified by order of the court within 180 days from the date of any order permanently enjoining the unlawful act or practice.

7. In any case arising under this subsection, no liability shall be imposed upon any gas supplier who shows by a preponderance of the evidence that (i) the act or practice alleged to be in violation of subdivision 1 of this subsection was an act or practice over which the same had no control, or (ii) the alleged violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid a violation. However, nothing in this section shall prevent the court from ordering restitution and payment of reasonable attorney's fees and court costs pursuant to subdivision 4 of this subsection to individuals aggrieved as a result of an unintentional violation of this subsection.

§ 58.1-2600. Definitions.

A. As used in this chapter:

"Certificated motor vehicle carrier" means a common carrier by motor vehicle, as defined in § 46.2-2000, operating over regular routes under a certificate of public convenience and necessity issued by the Commission or issued on or after July 1, 1995, by the Department of Motor Vehicles. A transit company or bus company that is owned or operated directly or indirectly by a political subdivision of this Commonwealth shall not be deemed a "certificated motor vehicle carrier" for the purposes of this chapter and shall not be subject to the imposition of the tax imposed in § 58.1-2652, nor shall such transit company or bus company thereby be subject to the imposition of local property levies. A common carrier of property by motor vehicle shall not be deemed a "certificated motor vehicle carrier" for the purposes of this chapter and shall not be subject to the imposition of the tax imposed in § 58.1-2652, but shall be subject to the imposition of local property taxes.

(Effective until December 31, 2001) "Cogenerator" means a qualifying cogenerator or qualifying small power producer within the meaning of regulations adopted by the Federal Energy Regulatory Commission in implementation of the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617).

"Commission" means the State Corporation Commission which is hereby designated pursuant to Article X, Section 2 of the Constitution of Virginia as the central state agency responsible for the assessment of the real and personal property of all public service corporations, except those public service corporations for which the Department of Taxation is so designated, upon which the Commonwealth levies a license tax measured by the gross receipts of such corporations. The State Corporation Commission shall also assess the property of each telephone or telegraph company.

"Department" means the Department of Taxation which is hereby designated pursuant to Article X, Section 2 of the Constitution of Virginia as the central state agency to assess the real and personal property of railroads and pipeline transmission companies as defined herein.

"Estimated tax" means the amount of tax which a taxpayer estimates as being imposed by Article 2 (§ 58.1-2620 et seq.) of this chapter for the tax year as measured by the gross receipts received in the taxable year.

"Freight car company" includes every car trust, mercantile or other company or person not domiciled in this Commonwealth owning stock cars, furniture cars, fruit cars, tank cars or other similar cars. Such term shall not include a company operating a line as a railroad.

"Gross receipts" means the total of all revenue derived in the Commonwealth, including but not limited to, income from the provision or performance of a service or the performance of incidental operations not necessarily associated with the particular service performed, without deductions for expenses or other adjustments. Such term shall not, however, include interest, dividends, investment income or receipts from the sale of real property or other assets except inventory of goods held for sale or resale.

"Pipeline distribution company" means a corporation, (other than a pipeline transmission company,) whose rates and service are subject to regulation by the Commission and which transmits, by means of a pipeline, natural gas, manufactured gas or crude petroleum and the products or by-products thereof to a purchaser or to an ultimate consumer for purposes of furnishing heat or light.

183 "Pipeline transmission company" means a corporation authorized to transmit natural gas,
184 manufactured gas or crude petroleum and the products or by-products thereof in the public service by
185 means of a pipeline or pipelines from one point to another when such gas or petroleum is not for sale to
186 an ultimate consumer for purposes of furnishing heat or light.

187 "Tax Commissioner" means the chief executive officer of the Department of Taxation or his
188 designee.

189 "Tax year" means the twelve-month period beginning on January 1 and ending on December 31 of
190 the same calendar year, such year also being the tax assessment year or the year in which the tax levied
191 under this chapter shall be paid.

192 "Taxable year" means the calendar year preceding the tax year, upon which the gross receipts are
193 computed as a basis for the payment of the tax levied pursuant to this chapter.

194 "Telegraph company" means a corporation or person operating the apparatus necessary to
195 communicate by telegraph.

196 "Telephone company" means a person holding a certificate of convenience and necessity granted by
197 the State Corporation Commission authorizing telephone service; or a person authorized by the Federal
198 Communications Commission to provide commercial mobile service as defined in § 332(d) (1) of the
199 Communications Act of 1934, as amended, where such service includes cellular mobile radio
200 communications services or broadband personal communications services; or a person holding a
201 certificate issued pursuant to § 214 of the Communications Act of 1934, as amended, authorizing
202 domestic telephone service and belonging to an affiliated group including a person holding a certificate
203 of convenience and necessity granted by the State Corporation Commission authorizing telephone
204 service. The term "affiliated group" shall have the meaning given in § 58.1-3700.1.

205 B. For purposes of this chapter the terms "license tax" and "franchise tax" shall be synonymous.

206 § 58.1-3814. Water or heat, light and power companies.

207 A. Any county, city or town may impose a tax on the consumers of the utility service or services
208 provided by any water or heat, light and power company or other corporations coming within the
209 provisions of Chapter 26 (§ 58.1-2600 et seq.) *or any person selling natural gas at retail*, which tax
210 shall not be imposed at a rate in excess of twenty percent of the monthly amount charged to consumers
211 of the utility service and shall not be applicable to any amount so charged in excess of fifteen dollars
212 per month for residential customers; *provided, however, that in the case of sales of natural gas at retail*
213 *to customers eligible for natural gas transportation service under tariffs in effect on July 1, 1999, the*
214 *rate and amount of such tax applicable to such sales to such customers shall in no event be higher than*
215 *the rate and amount being paid as of such date.* Any city, town or county that on July 1, 1972, imposed
216 a utility consumer tax in excess of limits specified herein may continue to impose such a tax in excess
217 of such limits, but no more.

218 B. Any tax enacted pursuant to the provisions of this section, or any change in a tax or structure
219 already in existence, shall not be effective until sixty days subsequent to written notice by certified mail
220 from the county, city or town imposing such tax or change thereto, to the registered agent of the utility
221 corporation that is required to collect the tax.

222 C. Any county, city or town may impose a tax on the consumers of services provided within its
223 jurisdiction by any electric light and power, water or gas company owned by another municipality;
224 provided, that no county shall be authorized under this section to impose a tax within a municipality on
225 consumers of services provided by an electric light and power, water or gas company owned by that
226 municipality. Any county tax imposed hereunder shall not apply within the limits of any incorporated
227 town located within such county which town imposes a town tax on consumers of utility service or
228 services provided by any corporation coming within the provisions of Chapter 26, provided that such
229 town (i) provides police or fire protection, and water or sewer services, provided that any such town
230 served by a sanitary district or service authority providing water or sewer services or served by the
231 county in which the town is located when such service or services are provided pursuant to an
232 agreement between the town and county shall be deemed to be providing such water and sewer services
233 itself, or (ii) constitutes a special school district and is operated as a special school district under a town
234 school board of three members appointed by the town council. Any county, city or town may provide
235 for an exemption from the tax for any public safety agency as defined in § 58.1-3813. Any city with a
236 population of not less than 27,000 and not more than 28,500 may provide an exemption from the tax for
237 any church or religious body entitled to an exemption pursuant to Article 4 (§ 58.1-3650 et seq.) of
238 Chapter 36. Any municipality required to collect a tax imposed under authority of this section for
239 another city or county or town shall be entitled to a reasonable fee for such collection.

240 D. In a consolidated county wherein a tier-city exists, any county tax imposed hereunder shall apply
241 within the limits of any tier-city located in such county, as may be provided in the agreement or plan of
242 consolidation, and such tier-city may impose a tier-city tax on the same consumers of utility service or
243 services, provided that the combined county and tier-city rates do not exceed the maximum permitted by
244 state law.

E. The tax authorized by this section shall not apply to utility sales of products used as motor vehicle fuels.

§ 59.1-199. Exclusions.

Nothing in this chapter shall apply to:

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

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

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

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

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

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