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Public Utility Law

B. Paige E. Holloway
McCandlish Holton, P.C.

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PUBLIC UTILITY LAW

B. Paige E. Holloway *

I. INTRODUCTION

This article addresses developments in the field of Virginia public utility law from June 2002 through May 2003. The information below includes selected judicial decisions by the Supreme Court of Virginia; studies, reports, and case decisions of the Virginia State Corporation Commission (“SCC”); and actions by the General Assembly of Virginia.

In the energy area, there continues to be tension between the General Assembly and the SCC regarding whether deregulation in Virginia should proceed according to the existing timetable under the Virginia Electric Utility Restructuring Act (“Restructuring Act”).¹ Although the General Assembly did delay the requirement for incumbent electric providers to join regional transmission entities (“RTE”) until January 1, 2005,² the SCC would have preferred that this legislation delay implementation of deregulation entirely.³ The General Assembly and the Governor of Virginia, Mark R. Warner, chose a less drastic path by addressing the RTE issue.⁴ The cases, reports, and legislation described below illustrate and evaluate the challenges presented by moving a heavily regulated industry to a market-based system. Both the Legislative Transition Task Force (“LTTF”)⁵ and the

* Of Counsel, McCandlish Holton, P.C., Richmond, Virginia. B.A., 1989, University of North Carolina, Chapel Hill; J.D., 1995, University of Richmond School of Law. With thanks to Phyllis Rubinstein, Jamie Martin, and Mark Finsterwald of McCandlish Holton, as well as Eric Page and Jim Guy of LeClair Ryan, P.C.

1. VA. CODE ANN. §§ 56-576 to -596 (Repl. Vol. 2003).

2. *Id.* § 56-579 (Repl. Vol. 2003).

3. *See, e.g.*, Greg Edwards, *Power Deregulation Changes Urged*, RICH. TIMES-DISPATCH, Mar. 22, 2003, at C1.

4. *Id.*

5. The General Assembly created the LTTF in the Restructuring Act to monitor and facilitate implementation of the Act. *See* VA. CODE ANN. § 56-595 (Cum. Supp. 2002).

SCC seek to protect Virginia consumers from unfair rates and unreliable service. The crux of the tension between the two entities rests on their disparate views as to how to achieve such protection.

In the telecommunications arena, localities and private entities disagreed over whether and how localities should offer communications services, as illustrated by the SCC case decisions and legislation described in this article. With regard to the Telecommunications Act of 1996,⁶ the General Assembly mandated that the SCC discharge the responsibilities of state commissions under the Telecommunications Act, including the arbitration of interconnection agreements between local exchange carriers.⁷ One of the key issues regarding whether and how the SCC should exercise this authority has been the possible waiver of sovereign immunity.⁸ Additionally, the Federal Communications Commission ("FCC") adopted new rules for network unbundling obligations of incumbent local exchange carriers ("ILECs"),⁹ indicating "its intention to give state commissions a larger role in establishing how ILECs had to share their networks with [competitive local exchange companies ("CLECs")]."¹⁰

With regard to water and sewer utilities, the General Assembly addressed issues such as construction, rates, and authority to regulate during its 2003 Session.

6. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) [hereinafter Telecommunications Act].

7. VA. CODE ANN. § 56-265.4:4(B)(4) (Repl. Vol. 2003).

8. See Robert M. Gillespie, *Will the SCC Suitout for Telecom Battles?*, ADMIN. L. NEWS (Va. State Bar, Richmond, Va.), Spring 2003, at 4.

9. Press Release, FCC, FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers (Feb. 20, 2003), available at <http://www.fcc.gov/headlines.html> (last visited Sept. 22, 2003). These new rules address issues such as the impairment standard, broadband, dedicated transport, and the unbundled network element platform ("UNE-P"), including the role of states. *Id.* Additionally, the new rules give the states "a substantial role in applying the [FCC's] impairment standard." *Id.*

10. Gillespie, *supra* note 8, at 10.

II. JUDICIAL DECISIONS

A. MCI WorldCom Network Services, Inc. v. Jones¹¹

In its Order of February 28, 2003, the Supreme Court of Virginia overturned an SCC decision wherein the SCC determined that it had jurisdiction over the telecommunications services provided to inmates of correctional facilities operated by the Virginia Department of Corrections (“VDOC”).¹² The court found that the SCC improperly construed Virginia Code section 56-234 as it read at the time of the SCC’s decision¹³ to allow the SCC to determine the reasonableness of rates charged and services provided to inmates, despite the Code section’s specific language exempting from SCC jurisdiction “contracts for service rendered by any telephone company to the state government.”¹⁴ The court agreed with MCI and the VDOC that: MCI provided services pursuant to a contract between MCI and the VDOC; and the contract was outside the jurisdiction of the SCC, despite the fact that the recipients of inmate phone calls pay for the charges incurred by the inmates using the telephone system.¹⁵

B. Northern Virginia Electric Cooperative v. Virginia Electric & Power Co.¹⁶

In February 2003, the Supreme Court of Virginia determined whether the Northern Virginia Electric Cooperative (“NOVEC”) or Dominion Virginia Power (“DVP”) had the right to provide electric service to the National Air and Space Museum Annex (“Annex”) adjacent to Dulles International Airport.¹⁷ Two-thirds

11. No. PUC-1999-00157 (Va. Feb. 28, 2003) (order), available at <http://www.state.va.us/scc/> (last visited Sept. 22, 2003).

12. *Id.* at 5.

13. See VA. CODE ANN. § 56-234 (Repl. Vol. 2001). The General Assembly amended Virginia Code section 56-234 during its 2002 Session, after the SCC’s decision but before the decision of the Supreme Court of Virginia. Briefs in the case included discussions of the legal implications, if any, of the amendment.

14. *MCI WorldCom Network Services*, No. PUC-1999-00157, at 4–5 (Va. Feb. 28, 2003) (order), available at <http://www.state.va.us/scc/> (last visited Sept. 22, 2003) (quoting VA. CODE ANN. § 56-234 (Repl. Vol. 2001)).

15. *Id.*

16. 265 Va. 363, 576 S.E.2d 741 (2003).

17. *Id.* at 366, 576 S.E.2d at 742.

of the site on which the Annex is located is within DVP's certificated service territory.¹⁸ Ninety-five percent of the building on the site is within the certificated service territory of NOVEC.¹⁹ The SCC allowed DVP to provide electric service under the circumstances presented, and the court upheld the SCC's decision.²⁰ According to the court, the SCC has the discretion to allow a consumer to choose its provider when the consumer's facilities are located in contiguous service territories and the consumer did not manipulate its land purchases.²¹ The court noted that the General Assembly could not have "envisioned the peculiar facts and circumstances of the present case" and therefore found that the issue was properly left to the discretion of the SCC.²²

III. ELECTRIC SERVICE RESTRUCTURING: 2003 REPORT OF THE LEGISLATIVE TRANSITION TASK FORCE

A. *Status of Electric Restructuring in the Commonwealth*

The LTTF issued its annual report ("LTTF Report") on the status of electric utility restructuring in Virginia in April 2003.²³ Issues addressed in the LTTF Report ranged from the Federal Energy Regulatory Commission's ("FERC") proposed rule on Standard Market Design ("SMD Rule") to the Home Energy Assistance Fund.²⁴ The LTTF Report echoed some of the SCC's comments²⁵ that the decline in retail market activity in and around Virginia is due to the recent "credit crunch," questionable trading activity at the wholesale level, risks associated with the potential exercise of market power, and reductions in new power plant construction.²⁶

18. *Id.*

19. *Id.*

20. *Id.* at 367, 372, 576 S.E.2d at 743, 746.

21. *Id.* at 372, 576 S.E.2d at 746.

22. *Id.*

23. REPORT OF THE LEGISLATIVE TRANSITION TASK FORCE, S. Doc. No. 17, at iv, vii (2003) [hereinafter LTTF REPORT].

24. *Id.*

25. For more discussion on the SCC's comments see *infra* Part IV.

26. LTTF REPORT, *supra* note 23, at iii.

B. *Penalization of Wholesale Market Misconduct*

The LTTF addressed other issues in electric utility restructuring, including its examination of Virginia's possible jurisdiction to penalize wholesale market misconduct under the Virginia Anti-trust Act.²⁷

C. *Legislative Transition Task Force Analysis of Proposed Amendments to the Restructuring Act*

The LTTF considered a variety of legislative "proposals to amend the Restructuring Act or otherwise further the introduction of competition for electric generation."²⁸ The LTTF endorsed both House Bill 2453,²⁹ which postponed the requirement that incumbent providers join a regional transmission organization by January 1, 2001,³⁰ and House Bill 2319,³¹ which modified the Restructuring Act and the Natural Gas Deregulation Act "to require the SCC [to] develop models to be used in pilot programs for municipal aggregation."³²

The LTTF committed to review two Senate bills to be introduced by Senator John C. Watkins during the 2003 Session.³³ The first, Senate Bill 891, addressed a wires charge exemption for commercial and industrial consumers under certain conditions.³⁴ The second, Senate Bill 892, addressed an exemption from minimum stay requirements for retail consumers under certain conditions.³⁵

27. *Id.* at 33–34, 42.

28. *Id.* at 35.

29. H.B. 2453, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Apr. 2, 2003, ch. 990, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 56-577, -599 (Repl. Vol. 2003))).

30. LTTF REPORT, *supra* note 23, at 35–36.

31. H.B. 2319, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 20, 2003, ch. 795, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 56-577, -589 (Repl. Vol. 2003))).

32. LTTF REPORT, *supra* note 23, at 37–38.

33. *Id.* at 39–42.

34. S.B. 891, Va. Gen. Assembly (Reg. Sess. 2003). The LTTF's endorsement of H.B. 2319 was made with the understanding that amendments to it would be made during the 2003 session.

35. S.B. 892, Va. Gen. Assembly (Reg. Sess. 2003).

D. *State Corporation Commission Work Group on Stranded Cost Recovery*

The LTFF unanimously adopted a resolution requesting the SCC to convene a work group to form consensus recommendations on stranded cost recovery, which the SCC did in its order establishing the work group on March 3, 2003 in Case No. PUE-2003-00062.³⁶ Two members of the LTFF will monitor the work group established by the SCC, and the work group will report to the LTFF's subcommittee on stranded costs.³⁷

E. *Action on the State Corporation Commission Data Collection Report*

Pursuant to Senate Bill 684,³⁸ patroned by Senator Watkins and adopted by the General Assembly during its 2002 Session, the SCC presented its "report on the feasibility of collecting data on energy infrastructure and reliability."³⁹ The LTFF adopted without debate a resolution directing "the SCC, to the extent it is not currently doing so, to collect the data necessary to monitor the dedication of facilities to the provision of electricity service in the Commonwealth."⁴⁰ The LTFF reconsidered its adoption of this resolution at a later meeting and again chose to move it forward.⁴¹

F. *Future of Electric Restructuring in the Commonwealth*

Although implementation of the Restructuring Act is complex, "the members of the Task Force believe that . . . the successful implementation of the Restructuring Act offers the prospect for greater efficiencies that will provide tangible benefits to all resi-

36. LTFF REPORT, *supra* note 23, at 43.

37. *Id.* at 43-44.

38. S.B. 684, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 2, 2002, ch. 474, 2002 Va. Acts 572 (codified at VA. CODE ANN. § 56-576 (Repl. Vol. 2003); *id.* § 56-595 (Cum. Supp. 2002))). Virginia Code section 56-595 was repealed during the 2003 Session. See Act of Mar. 22, 2003, ch. 885, 2003 Va. Acts ____.

39. LTFF REPORT, *supra* note 23, at 43.

40. *Id.*

41. *Id.* at 44.

dents of the Commonwealth.”⁴² To achieve those benefits, the LTTF plans to evaluate whether the benefits justify the risks they may necessitate.⁴³ To that end, the LTTF “recognizes that wholesale markets offer both the promise of nondiscriminatory access to transmission assets by competing power generators and the threat that Virginia will lose some authority to ensure that its consumers are adequately protected.”⁴⁴ In the coming year, the LTTF⁴⁵ “will continue to monitor federal and regional developments to ensure that Virginia does not cede its authority to protect electricity consumers in the Commonwealth.”⁴⁶

IV. STATE CORPORATION COMMISSION COMMENTS AND REPORTS REGARDING ELECTRIC UTILITY RESTRUCTURING

Below are selected comments filed by the SCC with FERC, and reports from the SCC to the LTTF.

42. *Id.* at 46.

43. *See id.*

44. *Id.*

45. In its 2003 Session, the General Assembly passed legislation renaming the LTTF the “Commission on Electric Utility Restructuring,” effective July 1, 2003. *Id.*

46. *Id.* at ix. The LTTF unanimously endorsed a proposal by Senator Watkins to amend Virginia Code section 56-579

to provide that a transfer of control over transmission assets to a[n] RTE shall not be approved if it would result in the direct or indirect transfer of jurisdiction over the reliability or price of generation serving current or future load in the Commonwealth from Virginia to the FERC or any other entity, or if the transfer would negatively affect the reliability or pricing of such generation.

Id. at 36–37.

This proposal was described by Senator Watkins “as a stop-gap measure to protect ratepayers in Virginia.” *Id.* at 37. Despite the unanimous endorsement by the LTTF, this language was not added as an amendment to any 2003 legislation. *Id.*

A. *Comments of the Commonwealth of Virginia State Corporation Commission to the Federal Energy Regulatory Commission Regarding Docket Numbers ER03-262-000 and ER03-262-001*⁴⁷

The SCC filed an answer opposing two motions for relief (“Motions”) filed with the FERC requesting that the FERC immediately grant certain companies authority to engage in certain transactions with PJM Interconnection, L.L.C. (“PJM”).⁴⁸ The public utility commissions of Michigan, Ohio, and Pennsylvania filed one motion; Exelon and Commonwealth Edison Company, the other.⁴⁹ The crux of the SCC’s position is that, contrary to arguments made in the Motions, FERC cannot “preempt the [SCC’s] lawful authority to consider and approve or disapprove requests by utilities operating within Virginia to transfer functional control of their transmission facilities to PJM or any other [regional transmission organization].”⁵⁰

B. *Comments of the Commonwealth of Virginia State Corporation Commission to the Federal Energy Regulatory Commission in the Matter of Remediating Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*⁵¹

The SCC takes issue with the FERC’s proposed SMD Rule in its comments,⁵² concluding that “both in concept and execution, the proposed rules are fundamentally flawed, and should be withdrawn by the [FERC] in favor of a thorough examination of the critical issues encompassed by them.”⁵³ The SCC recommends

47. Commonwealth of Virginia State Corp. Comm’n, Answer to the Mot. for Relief of the Michigan, Ohio and Pennsylvania Comm’ns and to the Mot. of Exelon Corp. and Commonwealth Edison Co. for Expedited Decision on Pending Applications to Join PJM, Nos. ER03-262-000, ER03-262-001, EC98-40-000, EC98-2770-000, and EC98-2786-000 (dockets not consolidated) (Apr. 1, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

48. *Id.*

49. *Id.* at 2.

50. *Id.* at 3–4.

51. Commonwealth of Virginia State Corp. Comm’n, Comments on Notice of Proposed Rulemaking, No. RM01-12-000 (Jan. 31, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003) [hereinafter *Remediating Undue Discrimination*].

52. For a detailed analysis of the SCC’s position, see *id.* at 2–14.

53. *Id.* at 71. The SMD Rule requires the unbundling of electric service into its three

specifically that a FERC review include an analysis of state and federal jurisdictional questions as well as cost-benefit analysis of the implementation of “the sweeping interposition of federal control over the nation’s electricity system.”⁵⁴

C. *Commonwealth of Virginia State Corporation Commission 2002 Status Report Addendum: Review of FERC’s Proposed Standard Market Design and Potential Risks to Electric Service in Virginia*⁵⁵

The SCC updated its 2002 Status Report⁵⁶ for the Governor and the LTFP on December 30, 2002 (“Addendum Report”).⁵⁷ The Addendum Report focuses on the FERC’s proposed SMD Rule and the risks Virginia faces operating under the SMD Rule.⁵⁸

In the Addendum Report, the SCC identifies and evaluates in detail issues of concern to it, including: (1) the possible elimination of native load preference, where consumers who have paid for generation and transmission facilities over the years no longer have first priority to be served by those facilities when demand exceeds available supply;⁵⁹ (2) the creation or exacerbation of load pockets;⁶⁰ (3) the ability of FERC or an RTE to conduct market monitoring;⁶¹ (4) the effect of locational marginal pricing;⁶² and (5)

main components—generation, transmission, and delivery. See COMMONWEALTH OF VIRGINIA STATE CORP. COMM’N, 2002 STATUS REPORT ADDENDUM: REVIEW OF FERC’S PROPOSED STANDARD MARKET DESIGN AND POTENTIAL RISKS TO ELECTRIC SERVICE IN VIRGINIA 2–3 (Dec. 30, 2002), available at <http://www.state.va.us/sc/caseinfo.htm> (last visited Sept. 22, 2003) [hereinafter ADDENDUM REPORT]. The Restructuring Act also requires Virginia electric utilities to join RTE’s and to transfer their transmission capabilities to an RTE. See *id.*

54. *Remedying Undue Discrimination*, *supra* note 51, at 71.

55. ADDENDUM REPORT, *supra* note 53.

56. COMMONWEALTH OF VIRGINIA STATE CORP. COMM’N, 2002 STATUS REPORT: THE DEVELOPMENT OF A COMPETITIVE RETAIL MARKET FOR ELECTRIC GENERATION WITHIN THE COMMONWEALTH OF VIRGINIA (Aug. 30, 2002), available at <http://www.state.va.us/sc/caseinfo.htm> (last visited Sept. 22, 2003) [hereinafter 2002 STATUS REPORT].

57. See ADDENDUM REPORT, *supra* note 53.

58. See *generally id.* at 3 (discussing the possibility of service interruptions on the hot-test and coldest days of the year).

59. *Id.* at 3.

60. *Id.* at 15–17. A load pocket is an area without sufficient generation or transmission sources to support competition, thereby enabling some generators to charge higher prices and some transmission entities to charge more, especially during peak periods. *Id.*

61. See *id.* at 17–18. According to the SCC, “FERC has concluded that the market cannot currently discipline power prices or ensure reliability.” *Id.* at 17. Therefore, market monitoring will be necessary and “[t]he SMD NOPR envisions a market monitoring

the effect on a low-cost energy state such as Virginia of establishing resource-adequacy on a regional basis.⁶³

These concerns, in addition to the SCC's analysis of the status of deregulation efforts nationwide,⁶⁴ lead it to conclude that Virginia should re-bundle its rates, postpone indefinitely the requirement in the Restructuring Act that incumbent utilities transfer their transmission assets to a FERC-regulated RTE, or eliminate the requirement altogether.⁶⁵ Such action, according to the SCC, would allow Virginia to preserve state jurisdiction at least until the details of the proposed SMD Rule become more certain.⁶⁶

*D. Report of the Commonwealth of Virginia State Corporation Commission to the Legislative Transition Task Force of the Virginia General Assembly on the Feasibility, Effectiveness, and Value of Collecting Data Pertaining to Virginia's Energy Infrastructure*⁶⁷

The genesis of this report to the LTTF regarding data collection was Senate Bill 684, passed during the 2002 Session of the Gen-

function that resides at the RTE and is responsible to both the independent governing board of the RTE and the FERC." *Id.* at 18. The SCC questions FERC's ability to oversee such a complex task when there is substantial debate about how to incorporate market monitoring into the functions of the RTE and about when markets need what type of mitigation. *Id.*

62. *See id.* at 19–20. FERC proposed Locational Marginal Pricing ("LMP") in its SMD as a way to price the cost of transmission congestion. *See id.* The SCC expresses concern in its Addendum Report that the current generation and transmission facilities were not built to support competition, which will result in congestion until the system is expanded. *See id.* at 19. According to the SCC, the LMP may compound this problem, inter alia, by enabling entities with market power to manipulate prices by withholding power from low-cost units. *See id.* at 19–20.

63. *See id.* at 20–21.

64. According to the SCC, "there are no sustained success stories, particularly for residential consumers," with regard to deregulation. *Id.* at 26. For a detailed discussion regarding the problems with deregulation, see *id.* at 25–29. *See also* 2002 STATUS REPORT, *supra*, note 56, at pt. 2.

65. *See* ADDENDUM REPORT, *supra* note 53, at 25, 29–32.

66. *See id.* at 31.

67. REPORT OF THE COMMONWEALTH OF VIRGINIA STATE CORP. COMM'N TO THE LEGISLATIVE TRANSITION TASK FORCE OF THE VIRGINIA GENERAL ASSEMBLY ON THE FEASIBILITY, EFFECTIVENESS, AND VALUE OF COLLECTING DATA PERTAINING TO VIRGINIA'S ENERGY INFRASTRUCTURE, at 1 (Nov. 20, 2002), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003) [hereinafter SCC REPORT TO THE LTTF].

eral Assembly.⁶⁸ After convening a work group to evaluate the issues presented, the SCC concluded that it may be feasible for the power industry to provide information, but that the value of the information collected would be questionable in light of proposed changes to the electricity markets at the federal and state levels.⁶⁹

V. SELECTED STATE CORPORATION COMMISSION CASE DECISIONS

A. *Energy*

1. Overview

The SCC amended and consolidated its Rules Governing Retail Access (“Rules”)⁷⁰ with modifications to address issues such as minimum stay periods, consolidated billing services, aggregation, and competitive metering services in accordance with SCC orders in cases PUE-2001-00013, PUE-2001-00296, PUE-2001-00297, PUE-2001-00298, and PUE-2002-00174.⁷¹ Additionally, the SCC amended its filing requirements for authority to construct and operate an electric generating facility.⁷²

The SCC based its final amendments on proposals drafted by its staff. These amendments included requiring filings on market power issues from incumbent electric utilities and their affiliates, as well as requiring filings on fuel and fuel infrastructure from facilities greater than 50 megawatts.⁷³ Additionally, the SCC streamlined filing requirements for facilities of 50 megawatts or less in accordance with Virginia Code section 56-578(D).⁷⁴

68. S.B. 684, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 2, 2002, ch. 474, 2002 Va. Acts 572). *See also supra* Part III.E.

69. SCC REPORT TO THE LTTF, *supra* note 67, at 17–19.

70. 20 VA. ADMIN. CODE §§ 5-312-10 to -120 (2003).

71. *Id.* §§ 5-312-10(Q), 5-312-90 (2003).

72. *Ex Parte: In re Further Amendment to Filing Requirements for Applications for Auth. to Construct and Operate an Elec. Generating Facility and Dev. of Expedited Permitting for Small Generating Facilities of 50 MW or Less*, Commonwealth of Virginia State Corp. Comm’n, Order Amending Filing Requirements, PUE-2001-00665, 2002 Va. PUC LEXIS 331, at *11 (Aug. 21, 2002).

73. *Id.* at *6–7, 13.

74. *Id.* at *4–5, 11.

2. Utility Customer Deposits

The SCC opened for comment its revisions to the rule governing utility customer deposits.⁷⁵ Of particular concern to the SCC is that some consumers receive no interest on their deposits.⁷⁶ The SCC sets the interest rate to be paid on deposits each January based on Treasury bill rates.⁷⁷ Customer-owned nonprofit utilities pay two percent less than investor-owned utilities.⁷⁸ Because the current rate for investor-owned utilities is 1.5%, customer-owned nonprofit utilities pay no interest to their customers for their deposits.⁷⁹

3. Memoranda of Agreement Regarding Environmental Issues

Cumulative environmental impacts regarding new electric generation, not addressed in the rule changes noted above, are addressed in a Memorandum of Agreement (“MOA”)⁸⁰ developed in accordance with Senate Bill 554 which was passed during the 2002 General Assembly Session.⁸¹ The SCC and the Virginia Department of Environmental Quality (“DEQ”) entered into the MOA after comment from interested parties to address “the coordination of reviews of [the] environmental impact of electric generating plants and associated facilities.”⁸²

Similarly, though not limited to electric generating plants, the SCC is considering a proposed MOA with the Virginia State Water Control Board (“SWCB”) regarding consultation on wetland

75. *Ex Parte: In the Matter Adopting a Revised Rule Governing Util. Customer Deposits*, Commonwealth of Virginia State Corp. Comm’n, Order Establishing Investigation and Inviting Comments, PUE-2003-00224 (June 2, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

76. *Id.* at 1.

77. *Id.*

78. *Id.*

79. *Id.*

80. *In the Matter of Receiving Comments on a Draft Memorandum of Agreement Between the Dept. of Envtl. Quality and the State Corp. Comm’n*, Commonwealth of Virginia State Corp. Comm’n, Order Distributing Memorandum of Agreement, No. PUE-2002-00315, 2002 Va. PUC LEXIS 333 (Aug. 14, 2002) [hereinafter *MOA Order*].

81. S.B. 554, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 4, 2002, ch. 483, 2002 Va. Acts 621 (codified at VA. CODE ANN. § 10.1-1186.2:1 (Cum. Supp. 2003); *id.* §§, 56-46.1, 56-580 (Repl. Vol. 2003))).

82. *MOA Order*, *supra* note 80, at *1.

impacts of siting determinations for facilities pursuant to Virginia Code section 62.1-44.15:5(D)(2).⁸³

4. Retail Choice

The SCC concluded a number of cases regarding retail choice in 2002, and is moving forward on a number of other retail choice cases. For example, on June 28, 2002, the SCC approved the application of Columbia Gas of Virginia to provide natural gas retail supply choice.⁸⁴ Regarding licenses to conduct business as a natural gas competitive service provider, the SCC approved the applications of both Stand Energy⁸⁵ and UGI Energy Services, Inc.⁸⁶ Shenandoah Valley Electric Cooperative filed an application for approval of retail access tariffs, and terms and conditions of service for retail access, which the SCC approved.⁸⁷

Further, the SCC gave conditional approval to NOVEC on its plan for retail choice⁸⁸ and opened for comment VEPCO's application for certain energy choice pilot programs,⁸⁹ which VEPCO filed pursuant to amendments to the Restructuring Act in House

83. *In the Matter of Receiving Comments on a Draft Memorandum of Agreement Between the State Water Control Bd. and the State Corp. Comm'n*, Commonwealth of Virginia State Corp. Comm'n, Order Inviting Comments, No. PUE-2003-00114 (Mar. 18, 2003) (quoting VA. CODE ANN. § 62.1-44.15:5(D)(2) (Cum. Supp. 2003)), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

84. *Application of Columbia Gas of Va., Inc., for Approval of a Retail Supply Choice Plan as Authorized by Section 56-235.8 of the Code of Virginia to Change Rates, Charges, Rules, and Regulations*, Commonwealth of Virginia State Corp. Comm'n, Order, No. PUE-2001-00587, 2002 Va. PUC LEXIS 262, at *1, *36-37 (Jun. 28, 2002). Note that in Phase II of this proceeding, Hearing Examiner Howard P. Anderson, Jr. issued his report on May 16, 2003, and the deadline for comment was June 6, 2003. *Id.*

85. *Application of Stand Energy Corp. for a License to Conduct Bus. as a Natural Gas Competitive Serv. Provider*, Commonwealth of Virginia State Corp. Comm'n, Order Granting License, No. PUE-2002-00654, at 2 (Jan. 23, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

86. *Application of UGI Energy Servs., Inc. for a License to Conduct Bus. as a Natural Gas Competitive Serv. Provider*, Commonwealth of Virginia State Corp. Comm'n, Order Granting License, No. PUE-2002-00524, at 2 (Nov. 2, 2002), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

87. *Application of Shenandoah Valley Elec. Coop. for Approval of Retail Access Tariffs and Terms and Conditions of Serv. for Retail Access*, Commonwealth of Virginia State Corp. Comm'n, Final Order, No. PUE-2002-00575, 2003 Va. PUC LEXIS 217, at *12. (Apr. 2, 2003).

88. *Application of N. Va. Elec. Coop. for Review of the Tariffs and Terms and Conditions of Serv.*, Commonwealth of Virginia State Corp. Comm'n, Final Order, No. PUE-2002-00086, 2002 Va. PUC LEXIS 293, at *19. (June 18, 2002).

89. *Id.*

Bill 2319 enacted during the 2003 session of the General Assembly.⁹⁰ Finally, New Era Energy, Inc. received SCC approval to conduct business as an electric aggregator.⁹¹

5. Amendments to the Restructuring Act

New deadlines are in place with regard to requirements in the Restructuring Act for incumbent providers to transfer control of transmission facilities to independent transmission providers. The General Assembly amended the Restructuring Act during its 2003 Session to: (1) delay the deadline for incumbents to transfer control until January 1, 2005; (2) prohibit a transfer on control prior to July 1, 2004; and (3) require that applications to transfer control be submitted to the SCC by July 1, 2003.⁹² Prior to the action by the General Assembly, American Electric Power ("AEP") filed a substitute application with the SCC on December 19, 2002.⁹³ The SCC issued an Order for Notice on March 7, 2003, noting that the SCC does not intend to make a final decision on AEP's application before the FERC's SMD Rule becomes final due

90. H.B. 2319, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 20, 2003, ch. 795, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 56-577, -589 (Repl. Vol. 2003))).

91. *Application of New Era Energy, Inc. for a License to Conduct Bus. as an Aggregator*, Commonwealth of Virginia State Corp. Comm'n, Order Granting License, No. PUE-2002-00514, at 3 (Nov. 4, 2002), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003). Note that on March 12, 2003, New Era sent a letter to the SCC in this case requesting renewal of its license. See Letter from Jack Greenhalgh, President of New Era Energy, to Joel H. Peck, Clerk, Commonwealth of Virginia State Corp. Comm'n (Mar. 12, 2003) available at <http://www.state.va.us/scc.caseinfo.htm> (last visited Sept. 22, 2003).

92. Act of Apr. 2, 2003, ch. 990, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-579 (Repl. Vol. 2003)).

93. *Ex Parte: In the Matter Concerning the Application of Appalachian Power Co. d/b/a Am. Elec. Power-Va. for Approval of a Plan to Transfer Functional and Operational Control of Certain Transmission Facilities to a Reg'l Transmission Entity*, Commonwealth of Virginia State Corp. Comm'n, Order for Notice, No. PUE-2000-00550, at 1 (Mar. 7, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003). Both AEP and VEPCO, in cooperation with other utilities, intended to create an RTE known as "the Alliance," and filed applications with the SCC. See *Ex Parte: In the Matter Concerning Application of Va. Elec. and Power Co. d/b/a Dominion Va. Power for Approval of a Plan to Transfer Functional and Operational Control of Certain Transmission Facilities to a Reg'l Transmission Entity*, Commonwealth of Virginia State Corp. Comm'n, Dismissal Order, No. PUE-2000-00551, Va. PUC LEXIS 59, at *6-7 (Feb. 5, 2003) (dismissing VEPCO's application for approval of the transfer of operational and functional control of its transmission facilities to the Alliance Regional Transmission Organization and leaving the docket open for a future application for participation in a regional transmission entity).

to the substantial impact the SMD Rule will have on the SCC's analysis.⁹⁴ Further, the SCC ordered AEP to supplement its application with certain information by April 15, 2003, and again with additional information within ninety days of the issuance of the FERC's SMD Rule.⁹⁵

6. Master Power Purchase Agreement

VEPCO and Dominion Retail ("Companies") made a supplemental filing with the SCC to renew their petition for approval of the Master Power Purchase and Sale Agreement ("Sale Agreement") between the two companies.⁹⁶ A FERC ruling that rejected language that the SCC required the Companies to include in their agreement, necessitated the supplemental filing.⁹⁷ The language sought by the SCC made explicit the SCC's view of its "continuing supervisory control over the power agreements between [the Companies],"⁹⁸ but was rejected by the FERC on the grounds that the ensuing agreements would be wholesale transactions beyond the purview of the Commonwealth.⁹⁹

94. *Ex Parte: In the Matter Concerning the Application of Appalachian Power Co. d/b/a Am. Elec. Power-Va. for Approval of a Plan to Transfer Functional and Operational Control of Certain Transmission Facilities to a Reg'l Transmission Entity*, Commonwealth of Virginia State Corp. Comm'n, Order for Notice, No. PUE-2000-00550, at 1 (Mar. 7, 2003), available at <http://www.state.va.us/scs/caseinfo.htm> (last visited Sept. 22, 2003).

95. *Id.* at 12-16. The supplemental information requested requires a variety of analyses by AEP as to the impact of the SMD on its application to the SCC, including detailed cost/benefit analysis, "resource adequacy[,] pricing for and ancillary generation services[,] and regional planning." *Id.* at 12.

96. *Petition of Va. Elec. & Power Co. and Dominion Retail, Inc. for Exemption of Agreement for Wholesale Sales of Power from the Filing and Prior Approval Requirements of Chapter 4, Title 56 of the Code of Virginia, as Amended or, in the Alternative, for Approval of Wholesale Power Serv. Agreement Under Chapter 4, Title 56 of the Code of Virginia, as Amended, and for Expedited Consideration*, Commonwealth of Virginia State Corp. Comm'n, Supplemental Filing, No. PUE-2002-00181 (May 23, 2003), available at <http://www.state.va.us/scs/caseinfo.htm> (last visited Sept. 22, 2003).

97. *Id.* at 2-4.

98. *Petition of Va. Elec. & Power Co. and Dominion Retail, Inc. for Exemption of Agreement for Wholesale Sales of Power from the Filing and Prior Approval Requirements of Chapter 4, Title 56 of the Code of Virginia, as Amended or, in the Alternative, for Approval of Wholesale Power Serv. Agreement Under Chapter 4, Title 56 of the Code of Virginia, as Amended, and for Expedited Consideration*, Commonwealth of Virginia State Corp. Comm'n, Order, No. PUE-2002-00181, at 6 (June 28, 2002), available at <http://www.state.va.us/scs/caseinfo.htm> (last visited Sept. 22, 2003).

99. *Petition of Va. Elec. & Power Co. and Dominion Retail, Inc. for Exemption of Agreement for Wholesale Sales of Power from the Requirements of Section 56-77(A) of the Code of Virginia, as Amended or, in the Alternative, for Approval of Wholesale Power Serv.*

B. Telecommunications

1. Rules Governing the Offering of Competitive Local Exchange Telephone Service

The SCC revised its Rules Governing the Offering of Competitive Local Exchange Telephone Service¹⁰⁰ by separating the Rules into two chapters: one on the Rules Governing Certification and Regulation of Competitive Local Exchange Carriers (“LEC Rules”),¹⁰¹ and the other on the Rules Governing Compensation, Numbering, Interconnection and Other Local Inter-Carrier Matters (“IC Rules”),¹⁰² (collectively “Rules”). Interested parties provided substantial comment on the LEC Rules and less voluminous comment on the IC Rules.¹⁰³ The SCC modified its proposals in response to some comments, but not all.¹⁰⁴

With regard to the provision of services by Municipal Local Exchange Carriers (“MLECs”), the SCC noted that industry and localities “have very disparate positions” on implementation, and that the SCC “may initiate a further rulemaking to amend the final rules” if deemed necessary based on the “active proceeding regarding [the City of] Bristol’s pricing of local exchange telecommunications services.”¹⁰⁵ The SCC specifically noted its awareness of concerns regarding “cost studies, the determination of incremental costs, cross-subsidization, and the appropriate treatment of MLECs.”¹⁰⁶

Some of the issues the SCC specifically noted in its order adopting the rules include: (1) that the SCC return to existing

Agreement Under Chapter 4, Title 56 of the Code of Virginia, as Amended, and for Expedited Consideration, Commonwealth of Virginia State Corp. Comm’n, Supplemental Filing, No. PUE-2002-00181, Attach. B, at 2–3 (May 23, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

100. 20 VA. ADMIN. CODE § 5-400-180 (2002).

101. *Id.* §§ 5-417-10 to -80 (2003).

102. *Id.* §§ 5-429-10 to -60 (2003).

103. See *Ex Parte: In the Matter of Regulations Governing Competitive Local Exch. Carriers, Localities as Competitive Local Exch. Carriers, Localities as Competitive Local Exchange Carriers, & Local Inter-Carrier Matters*, Commonwealth of Virginia State Corp. Comm’n, Order Adopting Rules, No. PUC-2002-00115, 2003 Va. PUC LEXIS 205, at *2–4 (Apr. 9, 2003).

104. *Id.* at *6–8.

105. *Id.* at *7–8.

106. *Id.* at *7.

language for alternative pricing structures;¹⁰⁷ (2) that the SCC requires “true and correct, rather than certified” copies of organizational documents;¹⁰⁸ (3) that the SCC requires initial tariffs to be accepted and in effect before a new entrant may offer local exchange telecommunications services;¹⁰⁹ (4) that the LEC Rules “focus on the requirements” in Virginia Code section 56-265.4:4 with regard to MLECs;¹¹⁰ (5) in accordance with House Bill 2397,¹¹¹ that additional filing requirements be imposed for MLECs;¹¹² and (6) that the SCC opted not to adopt recommended changes in proposed bond and escrow requirements, noting that applicants may request a waiver of such requirements if desired.¹¹³

2. Certificated Service Territories

The SCC implemented legislation passed during the 2002 General Assembly session that required it to

amend the certificated service territory of each local exchange carrier that was previously certificated to provide service in only part of the Commonwealth to permit such carrier's provision of local exchange service throughout the Commonwealth beginning on September 1, 2002, unless that local exchange carrier notific[e]d the Commission prior to September 1, 2002, that it elect[ed] to retain its existing certificated service territory.¹¹⁴

107. *Id.* at *5.

108. *Id.*

109. *Id.*

110. *Id.*

111. H.B. 2397, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 771, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 56-235.5, -265.4:4, -484.7:1, -484.7:2, and -484.7:4 (Repl. Vol. 2003))).

112. *See Ex Parte: In the Matter of Regulations Governing Competitive Local Exch. Carriers, Localities as Competitive Local Exch. Carriers, & Local Inter-Carrier Matters*, Commonwealth of Virginia State Corp. Comm'n, Order Adopting Rules, No. PUC-2002-00115, 2003 Va. PUC LEXIS 205, at *6-7 (Apr. 9, 2003).

113. *Id.* at *7.

114. *Ex Parte: In re Amending the Certificated Serv. Territories of Local Exch. Carriers*, Commonwealth of Virginia State Corp. Comm'n, Order Amending Certificated Service Territories, No. PUC-2002-00179, 2002 Va. PUC LEXIS 351, at *1 (Sept. 3, 2002) (quoting VA. CODE ANN. § 56-265.4:4(B)(1) (Cum. Supp. 2002)).

Burke's Garden Telephone Company notified the SCC that it elected to retain its existing service territory, and was therefore the only local exchange carrier excluded from the SCC's Order.¹¹⁵

3. Municipal Local Exchange Providers

Several localities filed applications with the SCC for authority to provide local exchange telecommunications services, including the City of Danville¹¹⁶ and the City of Bristol.¹¹⁷

The City of Bristol's application was approved on November 26, 2002, and the city is taking the necessary steps to begin providing service.¹¹⁸ In fact, Bristol has two active cases before the SCC regarding its provision of local exchange services. The first addresses a challenge to the locality's initial tariff ("*Tariff Case*"),¹¹⁹ and the second addresses its interconnection agreement, which the SCC approved in May 2003 ("*Interconnection Case*").¹²⁰

In the *Tariff Case*, the SCC rejected Bristol's initial tariff, but allowed Bristol to provide local exchange services under an interim tariff subject to adjustment so long as the interim tariff meets certain conditions set by the SCC.¹²¹ Most recently, Bristol

115. *Id.* at *1.

116. *Application of the City of Danville d/b/a Danville Dep't of Utils. for Certificates of Public Convenience and Necessity to Provide Local Exch. Telecomms. Servs.*, Commonwealth of Virginia State Corp. Comm'n, Final Order, No. PUC-2002-00128, 2002 Va. PUC LEXIS 412, at *4-9 (Nov. 1, 2002) (concluding that a town should be included in a service territory that names a county).

117. *Application of the City of Bristol for a Certificate of Public Convenience and Necessity to Provide Local Exch. Telecomms. Servs. and for Interim Operating Auth.*, Commonwealth of Virginia State Corp. Comm'n, Order Granting Certificate, No. PUC-2002-00126, 2002 Va. PUC LEXIS 419, at *11-12 (Nov. 26, 2002) (approving the application over a variety of participant objections with the SCC).

118. *Id.* at *16-17.

119. *Petition of United Tel.-S.E., Inc. for Declaratory Judgment Interpreting Various Sections of the Code of Virginia, for Injunction Prohibiting the City of Bristol from Providing Telecomms. Servs. in Violation of State Law and for Other Relief*, Commonwealth of Virginia State Corp. Comm'n, Order, No. PUC-2002-00231, 2002 Va. PUC LEXIS 438 (June 2, 2003) [hereinafter *Tariff Case*].

120. *Application of United Tel.-S.E., Inc. & Cent. Tel. Co. of Va. and the City of Bristol d/b/a Bristol Va. Utils. Bd. for Approval of an Interconnection Agreement Under Section 252(e) of the Telecomms. Act of 1996*, Commonwealth of Virginia State Corp. Comm'n, Order Approving Agreement, No. PUC-2003-00047 (May 29, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

121. *Tariff Case*, Commonwealth of Virginia State Corp. Comm'n, Order, No. PUC-2003-00231, 2002 Va. PUC LEXIS 438, at *16-17 (June 2, 2003).

requested a second extension of time to file its cost study.¹²² Sprint objected, noting Bristol's "ability to begin bundling cable television services as of July 1, 2003, as an important reason for establishing the appropriateness of Bristol's telecommunication pricing" sooner rather than later.¹²³ Admonishing Bristol that further extensions were unlikely, the hearing examiner granted Bristol's request based on the significance of the cost studies to the overall proceeding.¹²⁴ The cost study is due August 15, 2003 and the hearing is delayed until December 1, 2003.¹²⁵

VI. SELECTED LEGISLATION AFFECTING PUBLIC UTILITIES IN THE COMMONWEALTH OF VIRGINIA

A. 2003 Energy Related Legislation¹²⁶

During the 2003 session of the General Assembly, Delegate Kenneth R. Plum patroned House Bill 2318¹²⁷ and House Bill 2319.¹²⁸ In House Bill 2318, the General Assembly extended the

122. See *Petition of United Tel.-S.E., Inc. for Declaratory Judgment Interpreting Various Sections of the Code of Virginia, for Injunction Prohibiting the City of Bristol from Providing Telecomms. Servs. in Violation of State Law and for Other Relief*, Commonwealth of Virginia State Corp. Comm'n, Hearing Examiner's Ruling, No. PUC-2002-00231, at 1 (June 2, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

123. *Id.*; see also VA. CODE ANN. §§ 56-265.4:4, -484.7:1 (Repl. Vol. 2003); *id.* §§ 15.2-2108.2, -2108.17 (Repl. Vol. 2003).

124. *Petition of United Tel.-S.E., Inc. for Declaratory Judgment Interpreting Various Sections of the Code of Virginia, for Injunction Prohibiting the City of Bristol from Providing Telecomms. Servs. in Violation of State Law and for Other Relief*, Commonwealth of Virginia State Corp. Comm'n, Hearing Examiner's Ruling, No. PUC-2002-00231, at 1-2 (June 2, 2003), available at <http://www.state.va.us/scc/caseinfo.htm> (last visited Sept. 22, 2003).

125. See *id.* at 2.

126. The Virginia Division of Legislative Services' Web site provides access to General Assembly legislation and summaries thereof dating back through the 1994 General Assembly Session. The summaries for the 2003 Session are available on the Internet. General Assembly of Virginia, Legislative Information System, at <http://leg1.state.va.us/> (last visited Sept. 22, 2003). The same summaries of the legislation may also be found in the Department of Legislative Services' 2003 Session Summary for the Virginia General Assembly. VA. GEN. ASSEMBLY DEP'T OF LEGISLATIVE SERVS., 2003 SESSION SUMMARY (2003).

127. H.B. 2318, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 22, 2003, ch. 904, 2003 Va. Acts ___ (referenced at VA. CODE ANN. § 56-595 (Repl. Vol. 2003))).

128. H.B. 2319, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 20, 2003, ch. 795, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 56-577, -589 (Repl. Vol. 2003))).

sunset provision for the LTTF from July 1, 2005 to July 1, 2008.¹²⁹ In House Bill 2319, the General Assembly authorized the SCC to establish opt-in and opt-out municipal aggregation pilots, any other pilot program in the public interest, and required the SCC to provide status reports to the LTTF.¹³⁰

The General Assembly extended the deadline for incumbent electric utilities with transmission capacity to join an RTE until 2005 in House Bill 2453, patroned by Delegate Harry J. Parrish.¹³¹ Under the new law, utilities must: (1) file an application with the SCC by July 1, 2003; (2) refrain from joining an RTE prior to July 1, 2004; and (3) transfer management and control of transmission assets to an RTE by January 1, 2005, subject to SCC approval.¹³² Additionally, the SCC must promulgate regulations governing the transfers that: (1) promote the public interest; (2) "ensur[e] that consumers' needs for economic and reliable transmission are met"; and (3) address adequately "the transmission needs of electric generation suppliers . . . including those that do not own, operate, control or have an entitlement to transmission capacity."¹³³ In addition, applications must include a study of comparative costs and benefits, including an analysis of the economic effects of a transfer of control on consumers and the effects of transmission congestion costs.¹³⁴ Finally, the SCC may approve a transfer of ownership or control of transmission facilities to an RTE "if it finds, after notice and hearing, that the transfer satisfies the conditions contained in" Virginia Code section 56-579.¹³⁵ The General Assembly passed Delegate Parrish's bill with an amendment by Governor Warner that added an emergency clause making the bill effective upon its passage.¹³⁶

129. H.B. 2318, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 22, 2003, ch. 904, 2003 Va. Acts ___ (referenced at VA. CODE ANN. § 56-595 (Repl. Vol. 2003))).

130. H.B. 2319, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 20, 2003, ch. 795, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 56-577(C), -589(A)(3) (Repl. Vol. 2003))).

131. H.B. 2453, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Apr. 2, 2003, ch. 990, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-579(A)(1) (Repl. Vol. 2003))).

132. VA. CODE ANN. § 56-579(A)(1) (Repl. Vol. 2003).

133. *Id.* § 56-579(A)(2)(d) (Repl. Vol. 2003).

134. *Id.* § 56-579(F) (Repl. Vol. 2003).

135. *Id.*

136. H.B. 2453, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Apr. 2, 2003, ch. 990, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-579 (Repl. Vol. 2003))).

B. 2003 Telecommunications Related Legislation

1. Amendments to Title 18 of the Code of Virginia

The General Assembly of Virginia replaced the term “telecommunications” with the term “electronic communications” throughout Title 18.2 of the Virginia Code in House Bill 1931, patroned by Delegate Samuel A. Nixon, Jr.¹³⁷ As a result of this change, the definitions for “electronic communication device,” “electronic communication service,” and “electronic communication service provider” also required modification.¹³⁸

2. Role of Localities in the Telecommunications Industry

The General Assembly enacted the Virginia Wireless Service Authorities Act in House Bill 2164, patroned by Delegate Clarence E. Phillips, to authorize any locality to create a wireless service authority, which may provide qualifying communications services as authorized by Virginia Code sections 56-484.7:1 through 56-484.7:7.¹³⁹ The General Assembly also passed House Bill 2397, patroned by Delegate Joe T. May, that allows the SCC to: (1) promulgate rules to implement Virginia Code section 56-484.7:1;¹⁴⁰ (2) provide additional circumstances on which the SCC may base a determination that telephone services are competitive;¹⁴¹ (3) place additional reporting requirements on localities that provide telecommunications services regulated by the SCC;¹⁴² and (4) prohibit most cross-subsidization and any acquisition by eminent domain of the facilities or certain other property

137. H.B. 1931, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 354, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 18.2-187.1, -190.1 to -190.5, -190.7, and -190.8 (Cum. Supp. 2003))).

138. *Id.*

139. H.B. 2164, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 18, 2003, ch. 643, 2003 Va. Acts ___ (codified at VA. CODE ANN. §§ 15.2-5431.1 to -5431.37 (Repl. Vol. 2003))).

140. H.B. 2397, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 711, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-484.7:1(E) (Repl. Vol. 2003))).

141. *Id.* (codified as amended at VA. CODE ANN. § 56-235.5(F) (Repl. Vol. 2003)).

142. *Id.* (codified as amended at VA. CODE ANN. § 56-265.4:4(B)(4) (Repl. Vol. 2003)).

of a communications service provider by a locality that provides qualifying communications services.¹⁴³

Senator William C. Wampler, Jr. patroned Senate Bill 875, passed by the General Assembly, to enable localities that operate a municipal electric utility, and obtain a certificate from the SCC to operate as a telephone utility, to offer cable television services.¹⁴⁴ The legislation allows any locality meeting certain conditions, including having installed a cable television headend prior to December 31, 2002, to own and operate a multi-channel video program service and be exempt from Virginia Code sections 15.2-2108.4 through 15.2-2108.8.¹⁴⁵

3. The State Corporation Commission's Role Under the Federal Telecommunications Act of 1996

House Bill 2721, patroned by Delegate Harvey B. Morgan,¹⁴⁶ requires the SCC to discharge the responsibilities of state commissions under the federal Telecommunications Act of 1996,¹⁴⁷ including the arbitration of interconnection agreements between local exchange carriers.¹⁴⁸ The legislation also authorizes the SCC to defer addressing selected issues in its discretion and increase levies to the extent necessary to recover the additional costs incurred in discharging these duties.¹⁴⁹

143. *Id.* (codified as amended at VA. CODE ANN. § 56-484.7:1 (Repl. Vol. 2003)).

144. S.B. 875, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 677, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 15.2-2108.2 to -2108.17, 56-265.4:4 (Repl. Vol. 2003))).

145. VA. CODE ANN. § 56-265.4:4(E) (Repl. Vol. 2003).

146. H.B. 2721, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 720, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2160 (Repl. Vol. 2003); *id.* § 56-265.4:4 (Repl. Vol. 2003); *id.* § 58.1-2660 (Cum. Supp. 2003))).

147. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

148. H.B. 2721, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 720, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-265.4:4(B)(4) (Repl. Vol. 2003))).

149. *Id.*

4. Taxation of the Telecommunication Industry in the Commonwealth

Recognizing the complexity of state and local taxing issues in the telecommunications industry, the General Assembly allowed the Joint Subcommittee to Study the State and Local Taxation of the Entire Telecommunications Industry and Its Customers Within the Commonwealth to continue for one year pursuant to House Joint Resolution 651, patroned by Delegate L. Preston Bryant, Jr.¹⁵⁰

In addition, the General Assembly addressed taxation of bundled transactions in Senate Bill 858, patroned by Senator Walter A. Stosch.¹⁵¹ The legislation allows services to remain non-taxable when bundled with taxable communications services if the provider can identify the non-taxable communications services in its records kept in the regular course of business.¹⁵² Bundled services are taxed at the highest applicable rate unless the provider can reasonably identify the portion of the charge attributable to services that should be taxed at a lower rate in its records kept in the regular course of business for other purposes.¹⁵³

5. Wireless Enhanced 9-1-1 Surcharges

The General Assembly modified the manner in which the wireless enhanced 9-1-1 (“E-911”) surcharge is collected from wireless customers in Senate Bill 942, patroned by Senator Charles J. Colgan.¹⁵⁴ The legislation provides alternative methods for collecting the wireless E-911 surcharge from consumers not billed on a monthly basis.¹⁵⁵

150. H.J. Res. 651, Va. Gen. Assembly (Reg. Sess. 2003).

151. S.B. 858, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 160, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3812(L) (Cum. Supp. 2003))).

152. *Id.*

153. VA. CODE ANN. § 58.1-3812(L) (Cum. Supp. 2003). For additional discussion of taxation and the telecommunications industry, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 38 U. RICH. L. REV. 267, 286 (2003).

154. S.B. 942, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 341, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-484.17(B) (Repl. Vol. 2003))).

155. *Id.*

C. 2003 Water/Sewer Utility Related Legislation

The General Assembly dealt with several issues affecting water and sewer utilities during its 2003 Session, including state agency authority, receivership, and rates.

1. Regulation of Treatment and Sewerage Systems

With regard to sewer utilities, the General Assembly passed House Bill 2602, patroned by Delegate L. Preston Bryant, Jr., to give the State Water Control Board ("SWCB") and DEQ sole authority to regulate the construction and operation of sewage treatment plants.¹⁵⁶ Consequently, the SWCB will issue certificates for construction and operation and will no longer share this duty with the Virginia Department of Health.¹⁵⁷

2. Appointment of Receivers for Private Waterworks

The General Assembly passed Senate Bill 966, patroned by Senator Watkins, which allows the Commissioner of Health ("Commissioner") to "petition the circuit court for the jurisdiction in which any private waterworks is located for the appointment of a receiver."¹⁵⁸ The Commissioner may file a petition if he "finds that the waterworks is unable or unwilling to provide adequate and safe service."¹⁵⁹ The court must hold a hearing and, if a receiver is appointed, the receiver takes possession of the assets of the waterworks in accordance with the order of the circuit court.¹⁶⁰ The waterworks "remain in receivership until the waterworks can, in the best interest of the customers, be returned to the owner, transferred to a new owner, or otherwise configured as [determined by the court]."¹⁶¹

156. H.B. 2602, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 18, 2003, ch. 614, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 62.1-44.18 (Cum. Supp. 2003))).

157. VA. CODE ANN. § 62.1-44.18(D) (Cum. Supp. 2003).

158. S.B. 966, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 458, 2003 Va. Acts ___ (codified at VA. CODE ANN. § 32.1-174.3(A) (Cum. Supp. 2003))).

159. VA. CODE ANN. § 32.1-174.3(A) (Cum. Supp. 2003).

160. *Id.* § 32.1-174.3(C)-(E) (Cum. Supp. 2003).

161. *Id.* § 32.1-174.3(D) (Cum. Supp. 2003).

3. Water and Sewer Rates

Senate Bill 1094, patroned by Senator John S. Edwards, addressed rate increases by small water and sewer utilities.¹⁶² Under the new legislation, small water or sewer utilities must file financial data with the SCC if they implement an increase in rates, fees, or charges that is fifty percent or greater of the utility's annual revenues.¹⁶³ Additionally, the utility must provide notice as required by Virginia Code section 56-265.13:5.¹⁶⁴ If a hearing is ordered,¹⁶⁵ the SCC shall expedite the hearing on the increase, and escrow the funds produced as a result of the increase until the SCC renders its decision.¹⁶⁶

4. SCC Regulation of Sewer Utilities

The General Assembly passed Senate Bill 1307, patroned by Senator Phillip P. Puckett, to address SCC regulation of sewage treatment services.¹⁶⁷ The legislation provides that the SCC "shall have no jurisdiction to regulate the rates, terms and conditions of sewage treatment services that are provided by [certain public utilities] . . . pursuant to the terms of a franchise agreement between the public utility and a municipality."¹⁶⁸

D. *Additional Changes in Public Utility Law in the Commonwealth of Virginia*

The General Assembly amended scattered sections of the Virginia Code affecting various other aspects of public utility law in the Commonwealth. This section highlights select amendments to the Virginia Code.

162. S.B. 1094, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 385, 2003 Va. Acts ___ (codified at VA. CODE ANN. § 56-265.13:6(C) (Repl. Vol. 2003))).

163. *Id.*

164. VA. CODE ANN. § 56-265.13:5 (Repl. Vol. 2003).

165. A hearing may be ordered if the SCC or twenty-five percent of the customers affected by the rate change believe the rate change to be unreasonable. *See id.* § 56-265.13:6(A) (Repl. Vol. 2003).

166. *See id.* § 56-265.13:6(C) (Repl. Vol. 2003).

167. S.B. 1307, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 172, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-232(A)(2) (Repl. Vol. 2003))).

168. *Id.*

1. Overhead High Voltage Safety Act

Amendments by the General Assembly to the Overhead High Voltage Safety Act in House Bill 2539, patroned by Delegate Robert F. McDonnell, included provisions to increase safety, modify liability, and address notice issues.¹⁶⁹ For example, Virginia Code section 59.1-408 was amended to increase the clearance required for work conducted near overhead high voltage lines from six feet to ten feet.¹⁷⁰ In addition, owners and operators of high voltage power lines will “not be liable for damage or loss to any person or property caused by work within 10 feet of [such] lines, unless notice has been given” pursuant to Virginia Code section 59.1-411, and the owner or operator has failed to comply with the provisions of Virginia Code section 59.1-410.¹⁷¹

2. Ratio Billing for Rental Property

The General Assembly passed House Bill 1945, patroned by Delegate Thelma Drake, to allow billing systems for commercial and residential buildings that “utilize[] a mathematical formula for allocating, among the tenants in a building, the actual water, sewer, electrical or natural gas billings received by the building owner from a third-party provider of the utility service.”¹⁷² The legislation also removes the two-dollar cap on administrative expenses in Virginia Code section 56-245.3(A), and allows charges for administrative fees based on actual costs in Virginia Code section 55-226.2(B).¹⁷³

169. H.B. 2539, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 364, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 59.1-407 to -411, and -414 (Cum. Supp. 2003))).

170. *Id.*

171. VA. CODE ANN. § 59.1-414(A) (Cum. Supp. 2003).

172. H.B. 1945, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 355, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-226.2(F) (Repl. Vol. 2003))).

173. *Id.* (codified as amended at VA. CODE ANN. §§ 56-226.2(B), -245.3(A) (Repl. Vol. 2003)). For additional discussion of ratio billing and its impact on Virginia real estate law, see Brian R. Marron & Christopher M. Gill, *Annual Survey of Virginia Law: Real Estate Law*, 38 U. RICH. L. REV. 223, 259 (2003).

3. Eminent Domain—Recodification of Title 25

Based on a report from the Virginia Code Commission (“Code Commission”), the General Assembly recodified Title 25 of the Virginia Code, which addresses eminent domain.¹⁷⁴ Senator William C. Mims, a member of the Code Commission, patroned Senate Bill 1007 to recodify Title 25 as Title 25.1, which had not been revised since 1950.¹⁷⁵ The legislation organizes Title 25.1 into four chapters.¹⁷⁶ Chapter 1 contains provisions that apply throughout the title, including definitions.¹⁷⁷ Chapter 2 addresses the general procedure by which condemnors exercise the power of eminent domain and is comprised of eight articles.¹⁷⁸ Chapter 3, according to the Code Commission’s report on the recodification, “represents a major organization change”¹⁷⁹ that addresses confusion created by requiring other governmental entities to use a quick take process developed for use by the Commonwealth Transportation Commissioner.¹⁸⁰ Chapter 4 includes many of the provisions that conformed Virginia law to the Uniform Relocation Assistance and Real Property Acquisitions Policy Act of 1970.¹⁸¹

4. Tax Issues

The General Assembly continues its examination of Virginia’s tax laws on a variety of levels.¹⁸² Senator Emmett W. Hanger introduced Senate Joint Resolution 347 regarding the Commission on the Revision of Virginia’s State Tax Code and the Streamlined

174. THE REPORT OF THE VIRGINIA CODE COMM’N ON THE REVISION OF TITLE 25 OF THE CODE OF VIRGINIA, S. Doc. No. 16, at v (2002), available at <http://legis.state.va.us/> (last visited Sept. 22, 2003).

175. S.B. 1007, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 24, 2003, ch. 940, 2003 Va. Acts ___ (codified in scattered sections of the Virginia Code)); see also THE REPORT OF THE VIRGINIA CODE COMM’N ON THE REVISION OF TITLE 25 OF THE CODE OF VIRGINIA, *supra* note 174, at v.

176. S.B. 1007, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 24, 2003, ch. 940, 2003 Va. Acts ___ (codified in scattered sections of the Virginia Code)).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* For additional discussion regarding the recodification of Title 25, see Marron & Gill, *supra* note 173, at 258.

182. For additional discussion of the changes in tax law in Virginia in 2003, see Bell, *supra* note 153, at 267.

Sales Tax Project Agreement.¹⁸³ The General Assembly passed the legislation and will: (1) examine the allocation of state and local government services and responsibilities; (2) conduct a comprehensive review of the revenue impact of all tax preferences; (3) evaluate the tax rates for all major state taxes; and (4) consider adopting the policies in the Streamlined Sales Tax Project Agreement.¹⁸⁴

VII. CONCLUSION

Despite economic conditions, public utility law remains a dynamic arena in terms of legal developments. Energy and telecommunications law changes at the federal level have brought modifications to state law, and evolving conditions regarding national security, corporate governance, and economic outlooks will continue to impact substantially these areas of law. Discussions addressing reliability are likely to be one of the major issues for the energy industry, and these discussions will impact decisions facing the General Assembly, the SCC, and the Governor. The telecommunications sector will continue to grapple with the implementation of the Telecommunications Act and address any ramifications of new authority granted to localities.

With regard to water and sewer utilities, Virginia must struggle with the ongoing challenges of providing these services to rural areas—facing substantial geographic and financial hurdles. In urban areas, the Commonwealth and localities face issues regarding whether existing systems can meet projected needs. Of course, both droughts and floods impact all of these questions. As has been said on many occasions, the one certainty for the future is change.

183. S.J. Res. 347, Va. Gen. Assembly (Reg. Sess. 2003).

184. REPORT OF THE JOINT SUBCOMM. STUDYING VIRGINIA'S STATE TAX CODE, H. Doc. No. 26, at i-ii (2003), available at <http://legis.state.va.us/> (last visited Sept. 22, 2003).