PUBLIC UTILITIES LAW

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INTRODUCTION

Over the past fifteen years, Virginia has witnessed numerous fundamental changes to the regulation of investor-owned electric utilities in the Commonwealth—from traditional cost-based rate regulation, to experiments with deregulation, and finally to "re-regulation" of utilities at the Virginia State Corporation Commission (the "SCC").[1] The legislature has also enacted various policies designed to encourage the construction of new power plants, energy conservation, and the development of clean energy resources. Almost every annual session of the Virginia General Assembly has brought at least one minor change to the Virginia Electric Utility Regulation Act. This article explains, at a high level, some of the major changes to electric regulation in Virginia in recent years. It also discusses how the General Assembly's new policies have affected retail electric rates and the development of new generation facilities, including renewable energy resources, in the Commonwealth since 1999.

I. VIRGINIA'S EXPERIMENT WITH DEREGULATION

Electric utilities, including those in Virginia, have traditionally been regulated by states pursuant to their police powers.[2] In a

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1. When discussing "electric utilities" or "utilities," this article is primarily referring to the two largest investor-owned electric utilities operating in the Commonwealth: Dominion Virginia Power and Appalachian Power Company. VA. STATE CORP. COMM'N, STAFF INVESTIGATION ON THE RESTRUCTURING OF THE ELECTRIC INDUSTRY 1 (2007), *available at* http://www.scc.virginia.gov/comm/reports/restrct4.pdf.

2. Evans B. Brasfield, *Regulation of Electric Utilities by the State Corporation Commission*, 14 WM. & MARY L. REV. 589, 589 (1973); *see* Munn v. Illinois, 94 U.S. 113, 122, 126 (1876) (authorizing rate and profit regulation of businesses "affected with a public in-

traditionally regulated jurisdiction, the rates utilities may charge its customers, and the profits utilities may retain, are determined by state public utility commissions.[3] There are many justifications for rate and profit regulation. But very simply, rate regulation by state commissions is intended to simulate competition in industries where little exists.[4] Typically, states grant electric utilities a monopoly to sell energy in a particular geographic region.[5] In exchange for this monopoly right, however, utilities must offer service to all customers on a non-discriminatory basis and must submit to rate and profit regulation by state regulators.

In the 1990s, many states began to experiment with the deregulation of the generation component of electricity, allowing customers to choose from whom to buy their power.[6] In deregulated markets, no utility holds a monopoly on the right to sell electricity, and customers are not required to purchase generation from an incumbent monopoly utility company.[7] Instead, customers may "shop" among various generation providers for the best rates. The theory supporting deregulation is based on competition.[8] Advocates of deregulation hope that electric rates will be reduced if more utilities and non-utility generating companies are allowed to compete for customers.[9]

terest").

3. *See Electric Rates in Virginia: How Are They Determined by the State Corporation Commission*?, VA. STATE CORP. COMM'N, http://www.scc.virginia.gov/comm/howerates.pdf (last visited Oct. 10, 2014); *see also How Natural Gas Utility Rates Are Set,* AM. GAS ASS'N, http://www.aga.org/our-issues/RatesRegulatoryIssues/ratesregpolicy/Training/Pages/How NaturalGasUtilityRates.aspx (last visited Oct. 10, 2014) (discussing how rates are set in the natural gas utility context).

4. *See* THE REGULATORY ASSISTANCE PROJECT, ELECTRICITY REGULATION IN THE U.S.: A GUIDE 5 (2011) [hereinafter ELECTRICITY REGULATION GUIDE].

5. *See, e.g.*, VA. CODE ANN. §§ 56-265.3 to -265.4 (Repl. Vol. 2012 & Supp. 2014). The exceptions to utilities' exclusive territory right are outlined in section 56-577(A)(5). *Id.* § 56-577(A)(5) (Repl. Vol. 2012).

6. Electric bills are comprised of several components, including generation, transmission, and distribution costs. "Deregulation" in the energy context refers to allowing customer choice for purchase of the generation component of electricity. *See* ELECTRICITY REGULATION GUIDE, *supra* note 4, at 8. In deregulated markets, customers may shop for generation suppliers, but local distribution utilities still own "the wires" and have a monopoly on the distribution of electricity. *See id*.

7. *Id*.

8. *See* REPORT OF THE COMM'N ON ELEC. UTIL. RESTRUCTURING, S. Doc. No. 12, at iii (2004) [hereinafter 2004 RESTRUCTURING COMM. REPORT].

9. Whether the deregulation of the generation component of electric services has in fact resulted in lower prices for consumers is subject to significant debate, but is beyond the scope of this article.

A. *1999 Restructuring Act*

In the late 1990s Virginia began to experiment with electric deregulation.[10] With the enactment of the Virginia Electric Utility Restructuring Act (the "Restructuring Act") in 1999, the Virginia General Assembly established a transition period for deregulation.[11] During the transition period the base rates[12] of Virginia's two largest electric utilities, Dominion Virginia Power ("Dominion") and Appalachian Power Company ("APCo"), were frozen or "capped."[13] The Restructuring Act sought to encourage competitive providers of energy to enter the market, thus allowing for competition for retail generation supply.[14] The transition period was originally scheduled to end on July 1, 2007.[15] At that point, retail electric customers were to have free choice to purchase their power from whichever generator offered the best terms.[16] In other words, incumbent investor-owned electric utilities such as Dominion and APCo would no longer have a monopoly over the generation component of electric sales in their service territories. The Virginia General Assembly's Commission on Electric Utility Restructuring ("CEUR") described promoting competition as the "paramount goal" of the Restructuring Act:

> The paramount goal of the Restructuring Act is the development of a competitive retail market-based system for the provision of the generation component of electric service. The Act envisions a system where consumers, guided by prices and other market signals, will be able to select their electricity suppliers from among competing providers of generation services.[17]

10. REPORT OF THE JOINT SUBCOMM. STUDYING RESTRUCTURING OF THE ELEC. UTIL. INDUS., S. Doc. No. 34, at 1 (1999) [hereinafter 1999 RESTRUCTURING COMM. REPORT].

11. Act of Mar. 25, 1999, ch. 411, 1999 Va. Acts 478, 480 (currently codified as amended at VA. CODE ANN. §§ 56–576 to -595 (Repl. Vol. 2012 & Supp. 2012)); *see* 1999 RESTRUCTURING COMM. REPORT, *supra* note 10, at 2–3.

12. Generally, base rates are designed to recover all operating costs of a utility, with the exception of fuel and purchased power costs as those costs are recovered through separate rate riders. Base rates are set at a level that will allow a utility to recover its operating costs plus a fair rate of return on common equity.

13. *See* REPORT OF THE LEGISLATIVE TRANSITION TASK FORCE ESTABLISHED UNDER THE VA. ELEC. UTIL. RESTRUCTURING ACT, S. Doc. No. 17, at 19–20 (2013).

14. 2004 RESTRUCTURING COMM. REPORT, *supra* note 8, at 6.

15. *Id.* at 10.

16. *Id.*

17. *Id.* at 6.

However, the General Assembly was also aware of the potential risks associated with deregulation and the Restructuring Act, namely that sufficient competition *would not* develop:

> As the Commonwealth jettisons the traditional cost-of-service-based system of regulating the rates charged by electric utilities, however, the risk exists that competition will not develop to a sufficient extent such that market forces are an effective means of regulating the prices that suppliers may charge consumers. The lack of development of effective retail competition may result in a scenario where instead of being served by monopoly providers, whose prices are regulated based on their cost of service, consumers will be served by unregulated monopoly providers that are able to exercise market power.[18]

In the absence of meaningful competition, and without state regulation of rates, providers of electricity could conceivably exercise significant market power and charge exorbitant prices.

B. *2004 Senate Bill 651*

Indeed, signs of trouble arose even before the expiration of capped rates. By 2004, sufficient competition for the generation component of electric generation had not developed, and the General Assembly rightly feared that customers could face drastic rate increases once rates were unfrozen and left to the free market.[19] The CEUR noted that "if competition does not materialize as expected during the next few years, the [CEUR] will take whatever steps are necessary to maintain the Commonwealth's long-standing status as a state with reliable and low-cost electric service."[20]

In late 2003, the SCC recommended, in a report to the General Assembly, that the legislature should consider delaying the implementation of deregulation.[21] The SCC noted that "the status of competition is not encouraging" and that there had been "little change in market conditions around the country or in Virginia"

18. *Id.*
19. *See id.*
20. *Id.* at v.
21. VA. STATE CORP. COMM'N, STATUS REPORT: THE DEVELOPMENT OF A COMPETITIVE RETAIL MARKET FOR ELECTRIC GENERATION WITHIN THE COMMONWEALTH OF VIRGINIA, at ix (2003), *available at* https://www.scc.virginia.gov/comm/reports/2003_1.pdf.

since the passage of the Restructuring Act.[22] The SCC also stated that "retail choice is not yet providing meaningful benefits or yielding sustained savings anywhere in the country."[23]

In 2004, the General Assembly, recognizing that sufficient competition for generation had not materialized in Virginia, delayed the Commonwealth's transition to retail choice. Senate Bill 651 extended the transition to deregulation to December 31, 2010.[24]

II. 2007 ELECTRIC UTILITY REGULATION ACT (VIRGINIA'S "RE-REGULATION" ACT)

From 2005 to 2007, meaningful competition did not develop in Virginia.[25] Meanwhile, market-based generation rates soared in other Mid-Atlantic states, such as Maryland, that had completed a transition to retail choice.[26] In its 2006 Report to the Governor and the General Assembly, the SCC explained that "retail competition has yet to develop especially for smaller consumers" and, as a result, the SCC "continue[d] to question the ability of retail electric competition to provide Virginians with lower prices for electric service than those that would have prevailed under traditional regulation of the industry."[27] In summary, the SCC noted that "the right to choose has still not evolved into the ability to choose."[28]

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22. *Id*. at xiii.

23. *Id*.

24. *See* S.B. 651, Va. Gen. Assembly (Reg. Sess. 2004) (enacted as Act of Apr. 14, 2004, ch. 827, 2004 Va. Acts 1268).

25. *See id*.; VA. STATE CORP. COMM'N, STATUS REPORT: THE DEVELOPMENT OF A COMPETITIVE RETAIL MARKET FOR ELECTRIC GENERATION WITHIN THE COMMONWEALTH OF VIRGINIA, at ii–iii (2005) [hereinafter 2005 SCC Report], *available at* https://www.scc.virginia.gov/comm/reports/2005_intro.pdf; *Virginia Restructuring Suspended*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/electricity/policies/restructuring/virginia.html (last visited Oct. 10, 2014).

26. Justin Blum, *The Power of Rising Energy Prices: Soaring Costs Have Md. Aluminum Plant on the Brink*, WASH. POST (Nov. 9, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801551.html.

27. VA. STATE CORP. COMM'N, STATUS REPORT: THE DEVELOPMENT OF A COMPETITIVE RETAIL MARKET FOR ELECTRIC GENERATION WITHIN THE COMMONWEALTH OF VIRGINIA, at iv (2006) [hereinafter 2006 SCC REPORT], *available at* https://www.scc.virginia.gov/comm/reports/2006_intro.pdf.

28. 2005 SCC REPORT, *supra* note 25, at iii.

In 2007, the General Assembly, recognizing the lack of meaningful competition for generation, abandoned the Commonwealth's transition to deregulation altogether. The legislature enacted a comprehensive "re-regulation" act, now referred to as the Virginia Electric Utility Regulation Act (the "2007 Act").[29] The 2007 Act, however, did not return to traditional cost of service-based regulation, as it existed in Virginia prior to 1999.[30] Instead, the 2007 Act established a novel regulatory system which limited the SCC's discretion in setting rates that utilities may charge and establishing their authorized rates of return while at the same time encouraging utilities to undertake large capital projects that could be charged to ratepayers through special rate adjustment clauses.[31] The regulatory system established by the 2007 Act remains largely in effect today, although there have been some notable changes to the law, as discussed below.

Virginia's two largest investor-owned electric utilities, Dominion and APCo, are the only utilities subject to the 2007 Act.[32] Dominion provides service to approximately 2.4 million customers in Virginia, while APCo serves approximately 500,000 customers in Southwest and southern Virginia.[33] Kentucky Utilities ("KU"), the only other investor-owned electric utility operating in the Commonwealth, serves approximately 29,000 customers in Southwest Virginia and is not subject to the 2007 Act by the terms of the statute.[34] KU's rates and rates of return are determined based on

29. Act of Apr. 4, 2007, ch. 888, 2007 Va. Acts 2402 (codified as amended at VA. CODE ANN. §§ 56-576 to -594 (Repl. Vol. 2012 & Cum. Supp. 2014)); Act of Apr. 4, 2007, ch. 933, 2007 Va. Acts 2614 (codified as amended at VA. CODE ANN. §§ 56-576 to -594 (Repl. Vol. 2012 & Cum. Supp. 2014)).

30. OFFICE OF THE ATT'Y GEN., RETURN-ON-EQUITY ENHANCEMENT ADDERS OF THE 2007 VA. ELECTRIC UTILITY REGULATION ACT 1 (2012) [hereinafter AG ROE ENHANCEMENT ADDERS REPORT].

31. *Id.* at 3–5.

32. *Id.* at 1.

33. *Id.*; *see* Peter Bacqué, *Dominion Va. Power Launches Text Alerts*, RICH. TIMES-DISPATCH (July 22, 2014, 3:50 PM), http://www.timesdispatch.com/business/economy/dominion-va-power-launches-text-alerts/article_731be890-8232-5507-aa19-0915958a3705.html.

34. VA. STATE CORP. COMM'N, STATUS REPORT: IMPLEMENTATION OF THE VIRGINIA ELECTRIC UTILITY REGULATION ACT 1 n.2 (2011), *available at* http://www.scc.virginia.gov/comm/reports/2011_veur.pdf; *About KU*, LG&E KU, http://lge-ku.com/our-company/about-ku (last visited Oct. 10, 2014).

traditional rate case principles and pursuant to Chapter 10 of Title 56 of the Virginia Code.[35]

A. *Biennial Base Rate Review Proceedings*

Perhaps the most significant component of the 2007 Act was the establishment of biennial review base rate proceedings.[36] The 2007 Act requires the SCC to review a utility's non-fuel base rates in a litigated rate case every two years.[37] Very simply, a utility recovers through its base rates, all costs necessary to provide electric service (with the exception of fuel costs and those costs that are recovered through special issue rate riders).[38] Base rates are also set at a level that will allow the utility to earn a fair rate of return (i.e., a profit).[39]

Several issues must be litigated in a biennial review case. First, the utility's earnings from base rates for the prior two-year period are reviewed and measured against the last authorized fair rate of return, which would have been established in the utility's last biennial review proceeding.[40] Depending on whether the utility's earned return was below, above, or within an earnings band around the authorized return, and in consideration of other factors, the SCC may increase rates, order rate credits, order rate reductions, or take no action on rates.[41] Second, the SCC must establish a new "fair rate of return on [common equity]" ("rate of return" or "ROE") to benchmark earnings for the next two-year period.[42] This new authorized rate of return will also be used in setting new rates prospectively and for any rate adjustment clauses.[43] To set the fair rate of return, the SCC receives evidence

35. *See* VA. CODE ANN. §§ 56-232 to -265 (Repl. Vol. 2012 & Supp. 2014).

36. *See id.* § 56-585.1(A)(3) (Supp. 2014).

37. *Id.* Costs of fuel, such as coal or gas, continue to be recovered through a separate rate mechanism called the "fuel factor." *Id.* § 56-249.6(A)(1) (Repl. Vol. 2012); AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 2 n.5.

38. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 3 n.10, 5.

39. *See id.* at 2 & n.6. Whether a utility actually does recover its full costs through base rates, however, is of course dependent on the amount of electricity sold. If a utility sells less energy, whether due to mild weather or an economic downturn, the utility bears the risk of not recouping all the costs that it was authorized to recover through rates.

40. *Id.* at 2–3.

41. *See id.* at 2.

42. *Id.* at 3.

43. *Id.*

regarding the utility's market cost of capital, which is the percentage return that a theoretical investor would require in order to invest in the utility and finance its operations.[44] After determining the utility's market cost of capital, the SCC sets the utility's authorized return.[45]

Importantly, the 2007 Act significantly constrained the SCC's discretion in determining a utility's fair rate of return on common equity. In a traditional rate case, a public utilities commission would review a utility's projected growth rates, earnings, and other financial factors, such as expected future interest rates, to determine the utility's fair rate of return.[46] The allowed return must be fair and "sufficient to enable the [utility] to attract the necessary capital to carry out its obligation to render service to the public."[47] After determining the utility's authorized rate of return (i.e., the allowed profit level), the utility may then set its rates at a level that will allow it to recover its full costs of service plus the rate of return profit.[48] Thus, under traditional ratemaking, and prior to the 2007 Act and the General Assembly's experiment with deregulation, the SCC had the sole discretion to determine what a utility's authorized rate of return should be, provided that the authorized return was not so low as to constitute an unconstitutional "taking" of the utility's property.[49]

The 2007 Act, however, established a procedure for setting an "ROE floor" that constrained the SCC's ability to establish a fair rate of return based on a traditional cost of equity analysis.[50] For example, the statute requires the SCC to consider the average earned—i.e., not merely authorized—returns of a group of "peer utilities" when setting a rate of return.[51] The peer group floor guarantees that Dominion and APCo will have their authorized rates of return set no lower than the actual earned returns, as reported to the Securities and Exchange Commission, of a group of

44. *See id*. at 3 n.10, 4.

45. *See id*. at 3–4.

46. *See id*. at 3.

47. Commonwealth v. Va. Elec. & Power Co., 211 Va. 758, 769, 180 S.E.2d 675, 684 (1971) (citing Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944)).

48. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 3.

49. *See id*. (citing Duquesne Light Co. v. Barasch, 488 U.S. 299, 301–02 (1989)).

50. *Id*.

51. VA. CODE ANN. § 56-585.1(A) (Supp. 2014).

peer utilities in the Southeast.[52] Thus, if the average of the statutorily determined peer utilities rose higher than the market cost of equity determined by the SCC, then the SCC would be required to set the rate of return at the higher peer utility average.[53] In a situation where the peer group floor would require the SCC to set an ROE higher than it otherwise would have been, the result would be higher rates for consumers. Indeed, in a 2009 rate case for APCo, the SCC indicated that the appropriate cost of equity, and thus the appropriate ROE for rate setting, for APCo was 10%.[54] The peer group average, however, was determined to be higher (10.53%) and thus, the statute required the SCC to set the ROE higher than it otherwise would have been under traditional ratemaking.[55] This ROE increase attributable to the statutory ROE floor resulted in a $7 million increase in APCo's revenue requirement, which translated into a $0.70 increase to the monthly bill of a residential customer using 1000 kilowatt hours ("kWhs") per month.[56]

The 2007 Act also prevents the SCC from decreasing a utility's rates unless the utility has been deemed to have "over-earned" or exceeded its recovered costs in excess of its authorized revenue requirement for two consecutive biennial review periods.[57] But while the 2007 Act contains limitations on rate *decreases*, there

52. *See id.*; AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 4.

53. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 4.

54. *Application of Appalachian Power Co., For a Statutory Review of the Rates, Terms and Conditions for the Provision of Generation, Distribution and Transmission Services Pursuant to the § 56-585.1 of the Code of Virginia*, PUE-2009-00030, 2010 Va. PUC LEXIS 398, Final Order at *13 (July 15, 2010).

55. *Id.* at *19; *see* VA. CODE ANN. § 56-585.1(A) (Repl. Vol. 2007).

56. Ken Cuccinelli, *Another Viewpoint: Ken Cuccinelli: AG Clarifies APCo Info*, MARTINSVILLE BULL. (Sept. 13, 2010), http://www.martinsvillebulletin.com/article.cfm?ID=25259; *see also* VA. STATE CORP. COMM'N, ASSESSING THE RATES AND TERMS AND CONDITIONS OF INCUMBENT ELECTRIC UTILITIES IN THE COMMONWEALTH PURSUANT TO THE SEVENTH ENACTMENT CLAUSE OF CHAPTER 933 (SB 1416) OF THE 2007 ACTS OF ASSEMBLY 15 (2012), *available at* https://www.scc.virginia.gov/comm/reports/2012_IEU_Ch933.pdf ("Based on this ROE [using the statutory floor] and other ratemaking adjustments, the Commission approved an overall base rate increase of approximately $61.5 million. This base rate change increased the monthly bill for a residential customer using 1,000 kWh by $5.09, or by approximately 4.9%.").

57. *See* VA. CODE ANN. § 56-585.1(A)(8)(c) (Supp. 2014); *see* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 2.

are no similar limitations on rate *increases* for customers.[58] A utility may request a rate increase during any biennial review proceeding.[59]

B. *Rate Adjustment Clauses*

Another significant change to electric regulation in Virginia came with the implementation of rate adjustment clauses ("RACs"), sometimes referred to as rate riders or "trackers" in other jurisdictions.[60] RACs allow utilities to recover certain costs through special issue rate riders as opposed to through base rates.[61] This change provided significant benefits for utilities for several reasons. Most importantly, RACs *guarantee* recovery of all expenses included in the RAC.[62] For example, Virginia Code section 56-585.1(A)(5) currently provides several categories of rate adjustment clauses, including RACs for the recovery of power plant construction costs, environmental compliance costs, and expenses related to the development of new energy efficiency and demand-side management programs.[63] Therefore, any SCC-approved costs that are eligible for recovery through a rate adjustment clause are *guaranteed* to be recovered by the utility, along with its fair rate of return determined in a base rate case.[64] This is in contrast to traditional recovery through base rates whereby utilities only have the *opportunity* to recover their full costs of service, including a fair rate of return.[65]

For example, assume that a Virginia utility incurs a capital expense of $100 million in order to install pollution control equipment at a coal-fired power plant, and the SCC deemed this expense necessary and prudent. Assume further that the utility's

58. *See* VA. CODE ANN. § 56-585.1(A)(8)–(9) (Supp. 2014).

59. *See id*. § 56-585.1(A)(8)(a) (Supp. 2014).

60. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 4; *see also* AARP, INCREASING USE OF SURCHARGES ON CONSUMER UTILITY BILLS 2–3 (2012) (discussing the types of "single issue ratemaking," including "surcharges, trackers, riders, and other cost recovery mechanisms").

61. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 4.

62. *Id*. at 5.

63. VA. CODE ANN. § 56-585.1(A)(5) (Supp. 2014); *see* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 4–5.

64. *See* VA. CODE ANN. § 56-585.1(A)(5)(e) (Supp. 2014); AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 5.

65. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 3–5.

ROE was determined to be 10%. Under the current scheme, Virginia law allows a utility to recover its "actual costs" necessary to comply with environmental laws and regulations through a RAC.[66] This means that the utility would be guaranteed to recover every cent of the $100 million expense, plus an ROE of 10%. The RAC would also be updated on an annual basis, allowing the utility to "true-up" its costs and revenues, thus guaranteeing full recovery, plus an ROE of all environmental compliance expenses.[67]

Prior to the RAC provisions of the 2007 Act, utilities were required to seek recovery of all non-fuel expenses through base rates.[68] Importantly, under traditional ratemaking, utilities are not guaranteed to recover costs through base rates.[69] Instead, they only have the *opportunity* to recover their costs.[70] In the example above, under traditional ratemaking principles, the SCC might authorize a Virginia utility to recover $100 million in prudently incurred environmental compliance costs. The utility would be allowed to set its rates at a level that would allow it to recover these costs based on forecasted electric sales. Whether the utility did in fact recover those costs through rates, however, would depend on how many kWhs it sold. If the utility sold fewer kWhs than it expected, due to mild weather or economic factors, the utility might not fully recover its costs plus its authorized rate of return. This risk of under-recovery is eliminated with RACs.[71] The RACs authorized by the 2007 Act thus shift significant financial risks from a utility's shareholders to its ratepayers.

RACs also benefit utilities for other reasons. The RACs established by the 2007 Act allow utilities to receive "timely and current recovery" of costs.[72] In other words, utilities may now begin recovery of qualified expenses through a RAC proceeding as soon as a new project or program is approved, and may update and ad-

66. VA. CODE ANN. § 56-585.1(A)(5) (Supp. 2014).

67. *See id.*; AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 5.

68. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 3.

69. *See id*.

70. *See id.*; *see also* Norfolk v. Chesapeake & Potomac Tel. Co. of Va., 192 Va. 292, 301–02, 64 S.E.2d 772, 777–78 (1951) ("[The SCC] must . . . determine upon and set the percentage rate of return at such a figure as will afford the utility reasonable opportunity to earn a fair and just return on its investment.").

71. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 3–5.

72. VA. CODE ANN. § 56-585.1(A)(5) (Supp. 2014).

just the cost recovery as often as once every twelve months.[73] This means that utilities can reduce "regulatory lag," which is the time period between when a utility first makes an investment (such as when it starts construction of a power plant) and when the utility may begin to recover those costs through rates.[74] Under traditional Chapter 10 regulation and before the RAC provisions were enacted, utilities could recover costs of a new generation facility only through base rates and generally could only begin to recover the cost of the investment and earn a return once the facility began commercial operation.[75]

In short, the RAC provisions established under the 2007 Act provide powerful incentives for utilities to undertake capital projects that may be recovered through RACs, such as the construction of new power plants, since full cost recovery is guaranteed. RACs also minimize risk to the utility's shareholders that any prudently incurred costs will not be recovered by the utility.

C. *Incentives for Construction of New Generation Facilities*

In addition to its RAC provisions, the 2007 Act also contained other incentives and bonuses for Virginia utilities to construct new power generation facilities. Virginia Code section 56-585.1(A)(6), as originally enacted, contained numerous rate-of-return bonuses or "adders" designed to encourage utilities to construct new power generation facilities.[76] For example, this provision originally authorized rate of return bonuses of between 100 and 200 basis points (i.e., 1.0% and 2.0%) for numerous types of generation facilities, including nuclear, renewable-powered, combined cycle, and even conventional coal-fired power plants.[77] The

73. *Id.*

74. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 5; *see also* Seth W. Norton, *In Search of Regulatory Lag*, 26 Q. J. OF BUS. & ECON. 3, 3–4 (1987) (discussing regulatory lag for regulated utilities).

75. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 5.

76. Act of Apr. 4, 2007, ch. 888, 2007 Va. Acts 2402, 2415–16 (codified at VA. CODE ANN. § 56-585.1(A)(6) (Repl. Vol. 2007)); Act of Apr. 4, 2007, ch. 933, Va. Acts 2614, 2628–29 (codified at VA. CODE ANN. § 56-585.1(A)(6) (Repl. Vol. 2007)). The 2013 General Assembly, as discussed below, removed the rate of return bonuses for all generating types except for nuclear facilities and offshore wind construction projects. Act of Feb. 14, 2013, ch. 2, 2013 Va. Acts 2, 6 (codified as amended at VA. CODE. ANN. § 56-585.1(A)(6) (Supp. 2014)).

77. Ch. 888, 2007 Va. Acts 2402, 2415–16; Ch. 933, 2007 Va. Acts 2614, 2628–29.

adders were to be applied to all equity capital and financing costs of a facility for a term of years set by the SCC.[78] The length of time that the adders were to apply depended on several factors, including the SCC's opinion regarding how "critical" the facility was to meeting the energy needs of the Commonwealth.[79]

These basis points adders certainly incentivize the construction of new generation plants because they provide utility shareholders with additional profits.[80] But in so doing, the adders also increase the cost of particular projects, thus raising rates for customers.[81] Pursuant to the 2007 Act, Virginia utilities are, by law, guaranteed full cost recovery from customers of all costs necessary to construct and operate a new power plant.[82] Additionally, the 2007 Act guarantees utilities to recover a fair rate of return that is applied to all costs of the generation facility, *plus* a rate of return bonus to be applied to the costs of the generation facility on top of the utility's fair rate of return.[83]

For example, when Dominion received approval to construct a new natural gas combined cycle power plant in Brunswick County in 2013, the company was allowed to design its rates at a level that would guarantee full recovery of the $1.27 billion in costs necessary to construct the generation facility and related transmission infrastructure, plus a fair rate of return, *plus* a bonus applied to the general rate of return.[84] The SCC determined Dominion's fair rate of return to be 10.4% in its 2011 biennial review,[85] and the rate of return bonus authorized by subsection

78. Ch. 888, 2007 Va. Acts, 2402, 2415–16; ch. 933, 2007 Va. Acts 2614, 2628–29.

79. Ch. 888, 2007 Va. Acts, 2402, 2415–16; ch. 933, 2007 Va. Acts 2614, 2628–29.

80. *See* VA. CODE ANN. § 56-585.1(A)(6) (Supp. 2014); *see* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 21; *see also id.* at 44 ("These adders, or surcharges, . . . transfer an enormous amount of money from millions of individuals and businesses in the Commonwealth to utility companies and their shareholders . . . .").

81. For example, the subsection (A)(6) rate of return adder applied to Dominion's Brunswick Power Station in Brunswick County, Virginia, is estimated to increase costs to customers by over $76 million. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 32–33. A hypothetical new nuclear facility, using a conservation construction cost estimate of $10 billion, would increase total capital costs to customers by over $1.8 billion. *Id.*

82. VA. CODE ANN. § 56-585.1(A)(6) (Supp. 2014).

83. *Id.*

84. *See id.*; AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 32.

85. *Application of Va. Elec. & Power Co., For a 2011 Biennial Review of the Rates, Terms, and Conditions for the Provision of Generation, Distribution, and Transmission Services Pursuant to § 56.585.1 A of the Code of Virginia*, PUE-2011-00027, 2011 Va. PUC LEXIS 991, Final Order at *32–33 (Nov. 30, 2011).

(A)(6) for combined cycle power plants was 100 basis points, or 1%.[86] Therefore, Dominion was authorized to recover from customers an ROE of 11.4% (after tax) applied to the full construction costs of the facility.[87] The Attorney General's Office estimated that the cost increase attributable to the generation bonus for the Brunswick facility alone will be more than $76 million.[88]

D. *Promoting Clean Energy and Energy Efficiency*

The 2007 Act also sought, at least ostensibly, to promote the development of clean energy resources in the Commonwealth.[89] It included several provisions intended to incentivize the construction of renewable energy generation facilities and to provide air quality and environmental benefits.[90]

1. Voluntary Renewable Portfolio Standard Goals

The 2007 Act contained a voluntary renewable portfolio standard ("RPS"), which sought to promote the development of clean energy resources in the Commonwealth.[91] An RPS, sometimes referred to as a renewable energy standard, requires utilities to obtain a certain percentage of their electricity sales from renewable energy sources, such as solar, wind, biomass, or hydroelectric power facilities.[92] Over thirty states and the District of Columbia

86. VA. CODE ANN. § 56-585.1(A)(6) (Supp. 2014); *see Application of Va. Elec. & Power Co., For Approval and Certification of the Proposed Brunswick County Power Station and Related Transmission Facilities Pursuant to §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia, and for Approval of a Rate Adjustment Clause, Designated Rider BW, Pursuant to § 56-585.1 A 6 of the Code of Virginia*, PUE-2012-00128, 2012 Va. PUC LEXIS 761, Final Order at *30 (Aug. 2. 2013).

87. The SCC also determined that the rate of return bonus should be applied to costs of new transmission lines necessary to carry energy from the power plant to the broader electric grid. The Supreme Court of Virginia affirmed this decision on September 12, 2014. Office of Att'y Gen. v. State Corp. Comm'n, Nos. 131872, 131873, slip op. at 17 (Va. Sept. 12, 2014).

88. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 33.

89. *See id*. at i.

90. *See id*.; *see also, e.g.*, VA. CODE ANN. § 56-585.1(A)(6) (Repl. Vol. 2007) (incentivizing the construction of renewable energy generation facilities).

91. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at i, 6.

92. *Id.* at 6; *see* Ivan Gold & Nidhi Thakar, *A Survey of State Renewable Portfolio Standards: Square Pegs for Round Climate Change Holes?*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 183, 185–86 (2010).

have enacted some form of an RPS.[93] The requirements and stringency of state RPS laws vary significantly. California, for example, has a very robust RPS, requiring utilities to obtain 33% of their energy sales from renewable sources by 2020.[94] North Carolina, meanwhile, only requires utilities to meet a goal of 12.5% by 2021.[95] As originally enacted, the annual percentage goals found in Virginia's RPS gradually increase from 4% of the energy sold by a utility in 2007 to 15% by 2022.[96] Participating utilities are allowed to sell any renewable energy certificates ("RECs")[97] for purposes of RPS compliance.[98] Participating utilities may also sell RECs produced at their own facilities or acquired as part of a purchase power agreement.[99]

While most RPS laws are mandatory, Virginia's RPS contains voluntary renewable energy goals.[100] As such, Virginia's two largest utilities may, but are not required to, participate in the RPS program.[101] But the General Assembly, through the 2007 Act, included various incentives for APCo and Dominion to do so. First,

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93. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 11; *see also* Steven Ferrey, *Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future*, 17 VA. J.L. & TECH. 92, 97 (2012).

94. CAL. PUB. UTIL. CODE § 399.11 (Deering 2014); *California Renewable Portfolio Standard (RPS)*, CAL. PUB. UTIL. COMM'N, http://www.cpuc.ca.gov/PUC/energy/Renewables/ (last visited Oct. 10, 2014).

95. N.C. GEN. STAT. § 62-133.8 (2013).

96. VA. CODE ANN. § 56-585.2(D) (Repl. Vol. 2007). In calculating the energy sales in 2007, however, the Code excluded nuclear generation. *Id*. § 56-585.2(A) (Repl. Vol. 2007). In other words, when determining how much energy was sold by a utility in 2007, nuclear generation was subtracted from the total. *Id*. Therefore, a utility such as Dominion that obtains a significant portion of its energy sales from nuclear power sources had its annual RPS target lowered accordingly. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 13 & n.32; *see also Nuclear Energy*, DOMINION, https://www.dom.com/about/environment/report/nuclear-energy.jsp (last visited Oct. 10, 2014) (stating that Dominion nuclear stations provide for roughly one-third of the power in Virginia).

97. VA. CODE ANN. § 56-585.2(A) (Supp. 2014). RECs represent the environmental attributes of renewable generation and may be bought and sold as commodities that are separate from the underlying renewable generation. *Id.* § 56-585.2(D), (F), (J)(4) (Supp. 2014).

98. *See id.* § 56-585.2(D) (Supp. 2014). Most states allow utilities to use RECs for compliance with RPS goals. U.S. P'SHIP FOR RENEWABLE ENERGY FIN., RAMPING UP RENEWABLES: LEVERAGING STATE RPS PROGRAMS AMID UNCERTAIN FEDERAL SUPPORT 18, *available at* https://www.db.com/cr/en/docs/Ramping_up_Renewables-Leveraging_State_RPS_Programs_amid_Uncertain_Federal_Support.pdf (last visited Oct. 10, 2014).

99. VA. CODE ANN. § 56-585.2(F) (Supp. 2014).

100. *Id*. § 56-585.2(B) (Supp. 2014); AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 11–12.

101. *See* VA. CODE ANN. § 56-585.2(B) (Supp. 2014).

utilities may recover all RPS program expenses through an "RPS RAC" authorized by Virginia Code section 56-585.1(A)(5)(d).[102] Therefore, the ability to recover all expenses incurred to comply with the RPS goals is guaranteed.[103] Further, under its 2012 amendment, section 56-585.2 authorized a rate of return adder or bonus of 0.5% to be applied to a utility's general rate of return if the utility could demonstrate that it satisfied the renewable energy targets for the particular year.[104] In other words, if a utility was authorized to recover an ROE of 10%, the authorized rate of return would be increased to 10.5% if the utility satisfied its RPS goals.[105] Thus, if a utility could demonstrate that it was able to comply with the RPS goals, its shareholders would reap additional profits from the utility's ratepayers. APCo and Dominion have both participated in Virginia's RPS program thus far, and both utilities have complied with their annual goals.[106] In their 2011 rate cases, the RPS bonus resulted in annual revenue requirement increase of $7.75 million for APCo and $38.5 million for Dominion.[107]

Virginia's RPS does not require Virginia utilities to build any new renewable generation facilities. Instead, Virginia utilities may purchase RECs from out-of-state renewable facilities in order to satisfy the goals.[108] Many stakeholders, including former Attorney General Ken Cuccinelli and several environmental or-

102. *Id.* § 56-585.1(A)(5)(d) (Supp. 2014).

103. *Id.*; *id.* § 56-585.2(E) (Supp. 2014).

104. *Id.* § 56-585.2(C) (Repl. Vol. 2012). The General Assembly removed this incentive in 2013. *See id.* § 56-585.2(C) (Supp. 2014).

105. Unlike the rate of return bonus applied to generation construction projects, which is applied only to generation costs, see *supra* text accompanying note 83, the fifty basis points adder for meeting the utility's RPS goals was applied to the utility's entire rate base. *Id*. § 56-585.2(C) (Repl. Vol. 2012); *see* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 7.

106. *See, e.g.*, *Application of Va. Elec. & Power Co., For a 2011 Biennial Review of the Rates, Terms, and Conditions for the Provision of Generation, Distribution, and Transmission Services Pursuant to § 56.585.1 A of the Code of Virginia*, PUE-2011-00027, 2011 Va. PUC LEXIS 991, Final Order at *39–40 (Nov. 30, 2011) ("[Dominion] has met RPS Goals such that it is statutorily entitled to the RPS Performance Incentive under [section 56-585.2(C)], which requires the Commission to increase the Company's fair combined rate of return on common equity by an additional 50 basis points."); *Application of Appalachian Power Co., For a 2011 Biennial Review of the Rates, Terms and Conditions for the Provision of Generation, Distribution and Transmission Services Pursuant to § 56-585.1 A of the Code of Virginia*, PUE-2011-00037, Final Order at 8–9 (Nov. 30, 2011), *available at* http://docket.scc.virginia.gov/vaprod/main.asp.

107. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 7.

108. VA. CODE ANN. § 56-585.2(F) (Supp. 2014).

ganizations, have criticized Virginia's RPS, suggesting that the costs to consumers were significant, while the environmental benefits were minimal or non-existent.[109] As a result, as described below, the 2013 General Assembly modified, but did not eliminate, Virginia's voluntary RPS.[110]

2. Energy Efficiency Goals

The General Assembly, in the enactment clause to the 2007 Act, stated that it is in the public interest "to promote cost-effective conservation of energy through fair and effective demand side management, conservation, energy efficiency, and load management programs, including consumer education."[111] The General Assembly also established an energy efficiency target of 10% by 2022, directing that "[t]he Commonwealth shall have a stated goal of reducing the consumption of electric energy by retail customers through the implementation of [energy efficiency] programs by the year 2022 by an amount equal to ten percent of the amount of electric energy consumed by retail customers in 2006."[112] After setting this target, the General Assembly directed the SCC to evaluate whether achieving the 10% energy reduction target was feasible in Virginia.[113] The SCC ultimately concluded that the 10% energy reduction goal was in fact achievable in the time frame established by the General Assembly.[114]

The legislation does not speak to how the 10% energy reduction goal should be achieved, but one option is utility-sponsored energy efficiency programs.[115] Dominion, for example, has received approval to offer residential and commercial customers numerous incentives intended to encourage energy conservation, such as rebates for energy efficient lighting and appliance rebate pro-

109. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at i, 21.

110. Act of Feb. 14, 2013, ch. 2, 2013 Va. Acts 2, 9–11 (codified as amended at VA. CODE ANN. § 56-585.2 (Supp. 2014)).

111. Act of Apr. 4, 2007, ch. 933, 2007 Va. Acts 2614, 2636 (codified as amended at VA. CODE ANN. §§ 56-576 to -594 (Repl. Vol. 2012 & Cum. Supp. 2014)).

112. *Id.*

113. *Id.*

114. VA. STATE CORP. COMM'N, STAFF'S REPORT TO THE STATE CORPORATION COMMISSION IN PREPARATION FOR THE COMMISSION'S REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY 10 (2007), *available at* http://www.scc.virginia.gov/pue/conserve/staff/staf_rept111607.pdf.

115. Ch. 933, 2007 Va. Acts 2614, 2636.

grams.[116] Utilities obviously have no natural incentive to encourage their customers to conserve energy, which of course reduces the sale of their product—electricity.[117] In an attempt to mitigate this disincentive to support energy efficiency, utilities are, under the 2007 scheme, authorized to recover the cost of energy efficiency programs from customers through RACs.[118] The 2007 Act authorizes utilities that implement energy efficiency programs to recover "lost revenues" attributable to the energy sales that were lost due to the implementation of such programs.[119] APCo has not yet implemented any energy efficiency programs in Virginia, but has sought to do so in a recent filing with the SCC.[120]

3. Net Metering

Finally, the 2007 Act established a "net metering" option for Dominion and APCo customers.[121] Net metering provides an economic incentive for customers to install renewable energy devices on their property, such as rooftop solar facilities, which can offset their utility-supplied generation.[122] A net metering customer remains connected to the utility's distribution system, and can utilize utility-supplied power if the renewable devices do not provide enough generation to meet the customer's need.[123] Alternatively, if the customer's renewable device produces more electricity than the customer consumes, he or she can deliver the excess electrici-

116. *See Application of Va. Elec. & Power Co., For Approval to Implement New Demand-Side Management Programs and for Approval of Two Rate Adjustment Clauses Pursuant to § 56-585.1 A 5 of the Code of Virginia*, PUE-2009-00081, 2010 Va. PUC LEXIS 172, Order Approving Demand-Side Management Programs at *11 (Mar. 24, 2010).

117. *See* Jeff D. Makholm, *"Decoupling" for Energy Distributors: Changing 19th Century Tariff Structures to Address 21st Century Energy Markets*, 29 ENERGY L.J. 157, 158 (2008).

118. VA. CODE ANN. § 56-585.1(A)(5)(c) (Supp. 2014).

119. *Id.* ("[T]he Commission, if requested by the utility, shall allow for the recovery of revenue reductions related to energy efficiency programs . . . that are directly attributable to energy efficiency programs.").

120. *See Application of Appalachian Power Co., For a 2014 Biennial Review of the Rates, Terms and Conditions for the Provision of Generation, Distribution and Transmission Services Pursuant to § 56-585.1 A of the Code of Virginia*, PUE-2014-00026, 2014 Va. PUC LEXIS 237, Order for Notice and Hearing at *6 (Apr. 8, 2014).

121. *See* VA. CODE ANN. § 56-594 (Supp. 2014).

122. *See Net Metering*, DOMINION, https://www.dom.com/about/stations/renewable/net-metering.jsp (last visited Oct. 10, 2014); *see also* Kyle Weismantle, *Building a Better Solar Energy Framework*, 26 ST. THOMAS L. REV. 221, 223 (2014) ("[S]olar . . . technology can be encouraged at the state and local level through . . . net metering policies.").

123. *See Net Metering*, *supra* note 122.

ty to the utility's grid and receive credit for doing so.[124] As such, net metering customers only pay for the "net" power they consume.[125] Net metering customers, in addition to offsetting all or part of their energy usage, have the ability to sell the RECs generated from their renewable energy devices.[126] The ability to sell RECs, along with various federal tax incentives, provides customers with an additional incentive to install renewable energy devices at their homes or businesses.[127]

The 2007 Act established caps on the allowable size, in kilowatts ("kW"), of net metering facilities in Virginia.[128] Residential renewable facilities were originally capped at 10 kW, while commercial and industrial facilities were capped at 500 kW.[129] Virginia Code section 56-594(E) also provides that total net metering in a utility's service territory may not exceed 1% of the utility's peak load from the previous year.[130] Presumably, the caps were intended to limit the amount of kWh sales that would be lost by the utilities to customer-owned net metering facilities.

III. AMENDMENTS AND ADJUSTMENTS TO THE 2007 ACT

Several aspects of the 2007 Act have been modified by the General Assembly in recent years. Most significantly, the 2013 General Assembly removed the rate of return bonuses awarded to utilities for complying with Virginia's voluntary RPS and for most new generation projects.[131]

124. *See id.*; Weismantle, *supra* note 122, at 224.

125. *Net Metering*, *supra* note 122.

126. *Virginia: Net Metering*, DATABASE FOR STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://dsireusa.org/incentives/incentive.cfm?Incentive_Code=VA02R (last updated July 2, 2014); *see* NAT'L RENEWABLE ENERGY LAB., THE ROLE OF RENEWABLE ENERGY CERTIFICATES IN DEVELOPING NEW RENEWABLE ENERGY PROJECTS 1 (2011).

127. *See* Weismantle, *supra* note 122, at 223–24.

128. Act of Apr. 4, 2007, ch. 877, 2007 Va. Acts 2385, 2386–87 (codified as amended at VA. CODE ANN. § 56-594 (Repl. Vol. 2007)).

129. *Id*.

130. VA. CODE ANN. § 56-594(E) (Supp. 2014) ("The net metering standard contract or tariff shall be available to eligible customer-generators or eligible agricultural customer-generators on a first-come, first-served basis in each electric distribution company's Virginia service area until the rated generating capacity owned and operated by eligible customer-generators or eligible agricultural customer-generators in the state reaches one percent of each electric distribution company's adjusted Virginia peak-load forecast for the previous year . . . .").

131. *See* Act of Feb. 14, 2013, ch. 2, 2013 Va. Acts 2, 3, 5–6 (codified as amended at VA.

A. *Removal of ROE Adders for Certain Types of Generation Facilities and for Compliance with Virginia's Voluntary Renewable Portfolio Standard Goals*

In 2013, the General Assembly removed the fifty basis points rate of return bonus for compliance with RPS goals entirely.[132] This legislation, stripping the RPS bonus from the 2007 Act, was part of a compromise among stakeholders, including the two electric utilities subject to the 2007 Act—APCo and Dominion—and the Attorney General's Office.[133] The Attorney General's Office recommended in a 2012 report to the General Assembly that all of the rate of return bonuses for new generation facilities and for compliance with the RPS goals and for compliance with the RPS goals should be removed from the 2007 Act.[134] The General Assembly, however, chose to retain the bonuses for new nuclear and offshore wind facilities.[135] As amended, a Virginia utility that constructs a new nuclear or offshore wind facility will receive a 100 basis points (i.e., 1%) rate of return adder to be applied on top of the utility's general rate of return.[136] Moreover, all eligible generation projects approved prior to the law change will retain their bonus adders.[137] For example, a basis points adder will still be applied to Dominion's Brunswick County Power Station, approved by the SCC in August of 2013, because the utility's application for approval to build this facility was pending at the time the legislation was enacted.[138]

The 2013 General Assembly also removed the rate of return bonus of fifty basis points granted to each utility for achieving its annual RPS goals.[139] In other words, utilities may no longer re-

CODE ANN. § 56-585.1 (Supp. 2014)).

132. *Id*. at 10.

133. *See* Kenric Ward, *VA: Environmentalists on 'Green' Credits—Mend Them, Don't End Them*, WATCHDOG.ORG VA. BUREAU (Dec. 17, 2012, 1:31 PM), http://watchdog.org/64719/va-environmentalists-on-green-credits-mend-them-dont-end-them/.

134. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 44.

135. VA. CODE ANN. § 56-585.1(A)(6) (Supp. 2014).

136. *Id*.

137. *Id*.

138. *See Application of Va. Elec. & Power Co., For Approval and Certification of the Proposed Brunswick County Power Station and Related Transmission Facilities Pursuant to §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia, and for Approval of a Rate Adjustment Clause, Designated Rider BW, Pursuant to § 56-585.1 A 6 of the Code of Virginia*, PUE-2012-00128, 2013 Va. PUC LEXIS 813, Final Order at *30 (Aug. 2, 2013).

139. Act of Feb. 14, 2013, ch. 2, 2013 Va. Acts 2, 10 (codified as amended at VA. CODE

ceive a fifty basis points rate of return bonus to be applied to the utility's entire rate base for meeting the RPS goals.[140] The General Assembly did not, however, repeal Virginia's voluntary RPS; utilities may still participate in the program and may still recover all prudently incurred costs necessary for compliance.[141] Further, there is no indication that either APCo or Dominion intends to abandon its participation in Virginia's voluntary RPS program, even though the utilities will no longer receive a rate of return bonus for doing so.

B. *Additional Net Metering Options and "Standby" Charges*

With regard to customer-owned renewable energy, the General Assembly has made several adjustments to the net energy metering provisions of the 2007 Act. First, the 2011 General Assembly raised the cap on residential energy facilities from 10 kW to 20 kW, thus allowing larger and more renewable energy systems to be included in the program.[142] But the General Assembly also authorized utilities to seek "standby" charges from customers with facilities larger than 10 kW.[143] Because net metering customers remain connected to the grid and may utilize a utility's electricity when their own facilities are not producing energy, utilities want these customers to "chip in" for the maintenance of the utility's transmission and distribution system.[144] As Dominion has argued, net metering customers "still require electricity from Dominion when their own systems are not available," and a standby charge "covers the cost of Dominion's wires and equipment, which would be on standby for when these large alternative systems don't provide all the homeowner's power."[145]

ANN. § 56-585.2 (Supp. 2014)).

140. *Id.*

141. VA. CODE ANN. § 56-585.2(E) (Supp. 2014).

142. Act of Mar. 18, 2011, ch. 239, 2011 Va. Acts 367, 367 (codified as amended at VA. CODE ANN. § 56-594 (Supp. 2014)).

143. Ch. 239, 2011 Va. Acts 367, 368.

144. *See Application of Va. Elec. & Power Co., For Approval of a Standby Charge and Methodology and Revisions to its Tariff and Terms and Conditions of Service Pursuant to § 56-594 F of the Code of Virginia*, PUE-2011-00088, 2011 Va. PUC LEXIS 901, Final Order at *5 (Nov. 23, 2011).

145. *Frequently Asked Questions on Standby Charge*, DOMINION, https://www.dom.com/dominion-virginia-power/customer-service/rates-and-tariffs/pdf/faq-standby-charge.pdf (last visited Oct. 10, 2014).

In a 2011 order, the SCC set a standby rate for Dominion.[146] The SCC established a standby charge of $4.19 for each kW of installed capacity to compensate Dominion for its investments in transmission and distribution assets.[147] Accordingly, a net metering residential customer with a 10 kW solar installation would be required to pay Dominion a monthly standby charge of $41.90. APCo is also currently seeking approval for its own standby rate to be applied to customer-owned renewable energy facilities with a capacity of 10 kW or greater.[148]

The proper calculation of the rate and the policy implications of standby charges have been the subject of controversy. Some environmental advocates, for example, have argued that residential solar facilities actually benefit utilities, and the electric system as a whole, due to the nature of solar generation.[149] Because the peak output of solar facilities often corresponds with the hottest days of the year, and thus, the utilities' "peak demand," solar facilities may provide value to the electric system by reducing the utilities' need to purchase excess energy or ramp up more expensive power plants.[150] Some advocates have also argued that increased emissions-free renewable energy provides environmental benefits and, therefore, should not be discouraged by standby charges.[151]

In 2013, the General Assembly also expanded the net metering provisions to allow certain farms and other agricultural businesses to participate in net metering, provided that their energy facilities were no larger than 500 kW.[152] This change will encourage

146. *See Application of Va. Elec. & Power Co.*, 2011 Va. PUC LEXIS 901, Final Order at *3–5.

147. *Id.* at *2 ("The Company seeks approval of a standby charge consisting of a $2.79 per kilowatt distribution-related component, a $1.40 per kilowatt transmission-related component, and a $0.00 kilowatt generation-related 'placeholder' component.").

148. *Application of Appalachian Power Co., For a Biennial Review of the Rates, Terms and Conditions for the Provision of Generation, Distribution and Transmission Services Pursuant to § 56-585.1 A of the Code of Virginia*, PUE-2014-00026, 2014 Va. PUC LEXIS 237, Order for Notice and Hearing at *3 (Apr. 8, 2014).

149. *See, e.g.*, *Application of Va. Elec. & Power Co., For Approval of a Standby Charge and Methodology and Revisions to Its Tariff Terms and Conditions of Service Pursuant to § 56-594 (F) of the Code of Virginia*, PUE-2011-00088, Comments of Interstate Renewable Energy Council, at 5 (Oct. 27, 2011).

150. *See id.* at 3–5.

151. *See, e.g.*, Sean Casten, *Rebuttal: How Far We Have to Go*, 16 ELEC. J. 81, 84 (2003).

152. Act of Mar. 13, 2013, ch. 268, 2013 Va. Acts 460 (codified as amended at VA. CODE ANN. § 56-594 (Supp. 2014)).

larger-scale agricultural renewable energy operations in the Commonwealth.

C. *Encouraging Distributed Solar Generation and Energy Efficiency*

In addition to expanding net metering by raising the cap on system size, the 2011 General Assembly enacted a law, Chapter 771 of the 2011 Acts of Assembly, designed to encourage utilities to make investments in distributed solar generation.[153] Unlike large power plants, "distributed generation" refers to smaller power generation facilities that are distributed throughout a utility's service territory.[154] Distributed generation facilities are often owned by customers, not the utility.[155] The General Assembly provided:

> [t]hat in order to promote solar energy through distributed generation, the State Corporation Commission shall exercise its existing authority to consider for approval . . . petitions filed by a utility to construct and operate distributed solar generation facilities . . . with an aggregate amount of rated generating capacity of up to 0.20 percent of each electric utility's adjusted Virginia peak load for the calendar year 2010.[156]

The legislation further directed the SCC to approve such programs, provided that it found that they were "reasonably designed to be in furtherance of the public interest."[157]

Chapter 771 also authorized utilities to establish "feed-in tariffs" for solar energy "as alternatives to net energy metering."[158] A feed-in tariff is an agreement that requires a utility to purchase the output of renewable energy generated by a customer.[159] While

153. *See* Act of Apr. 6, 2011, ch. 771, 2011 Va. Acts 1278, 1278.

154. *See Distributed Generation*, VA. DEP'T OF ENVTL. QUALITY, http://www.deq.virginia.gov/Programs/PollutionPrevention/VirginiaInformationSourceforEnergy/DistributedGeneration.aspx (last visited Oct. 10, 2014).

155. *See* John V. Hurd, Note, *The Great Standby Rate Debate: Analysis of a Key Barrier to the Influx of Needed New Alternative Energy Sources*, 42 SUFFOLK U. L. REV. 939, 939–40 (2009).

156. Ch. 771, 2011 Va. Acts at 1278.

157. *Id.*

158. *Id.*

159. *Feed-In Tariff: A Policy Tool Encouraging Deployment of Renewable Electricity Technologies*, U.S. ENERGY INFO. ADMIN. (May 30, 2013), http://www.eia.gov/todayinenergy/detail.cfm?id=11471 ("A [feed-in tariff] program typically guarantees that customers who own a [feed-in-tariff]-eligible renewable electricity generation facility, such as a roof-

net metering offsets all or a portion of a customer's usage,[160] customers participating in a feed-in tariff program purchase all of their energy from their incumbent electric utility in exchange for the fixed price the utility pays for the electricity the customer provides to the grid.[161] Moreover, under a feed-in tariff program, customer-generators typically do not retain the rights to any RECs generated by their facilities.[162]

Thus far, only Dominion has requested SCC approval to implement any distributed solar programs pursuant to Chapter 771. In 2012, Dominion received SCC approval to construct and operate up to 30 megawatt ("MW") of distributed solar at various rooftop installations throughout its service territory.[163] The SCC specified that the utility may not charge customers more than $80 million for the project.[164] Dominion also received approval to implement a feed-in tariff program designed to facilitate up to 3 MW of solar generation from its residential customer class.[165]

D. *Accounting Changes for Nuclear and Offshore Wind Development Costs*

In 2014, the General Assembly enacted Senate Bill 459, a controversial change to the base rate provision of Virginia Code section 56-585.1, which adjusted how Dominion's nuclear development expenditures would be accounted for in future biennial

top solar photovoltaic system, will receive a set price from their utility for all of the electricity they generate and provide to the grid.").

160. *See supra* text accompanying notes 122–27.

161. *Feed-In Tariff*, *supra* note 159 ("[Feed-in tariff] programs are also similar to net metering programs but differ significantly in one key aspect: the power generated by a utility customer's system is compensated at a rate set by the [feed-in tariff] rather than the retail electricity rate. This generation is treated independently from the customer's own electricity use, which is billed at the utility's regular retail rates. In a net metering program, a utility customer is effectively paid the retail rate for any generation that is fed back into the grid.").

162. *See Which Program Is Right for You?*, DOMINION, https://www.dom.com/about/stations/renewable/solar/pdf/program-comparison-chart.pdf (last visited Oct. 10, 2014).

163. *Application of Va. Elec. & Power Co.*, *For approval of a Community Solar Power Program and for Certification of Proposed Distributed Solar Generation Facilities Pursuant to Chapter 771 of the 2011 Virginia Acts of Assembly and §§ 56-46.1 and 56-580 D of the Code of Virginia*, PUE-2011-00117, 2012 Va. PUC LEXIS 703, Order at *2, 24 (Nov. 28, 2012).

164. *Id*. at *10.

165. *Petition of Va. Elec. & Power Co.*, *For Approval of a Special Tariff to Facilitate Customer-Owned Distributed Solar Generation Pursuant to Chapter 771 of the 2011 Virginia Acts of Assembly*, PUE-2012-00064, Order at 1, 9 (Mar. 22, 2013).

review proceedings.[166] Senate Bill 459 provided that 70% of the costs of any development activities for a new nuclear facility incurred between July 1, 2007, and December 31, 2013, would be applied to the utility's earnings calculation in its next biennial review.[167] Because Dominion is the only utility in Virginia undertaking any nuclear development activities,[168] the legislation was written solely for Dominion. Opponents of the bill, including the Attorney General of Virginia, environmental groups, and various industrial organizations, argued that the bill was simply a manipulation of Dominion's earnings, intended to shield the utility from being deemed to have "over-earned" in its next base rate case.[169] The SCC had projected that Dominion would have "over-earned" by approximately $280 million during the company's next earnings review, which, absent Senate Bill 459, would have triggered rate credits for customers.[170] As *The Washington Post* reported, "[b]y writing off 70 percent of the nearly $600 million that Dominion says has been spent on nuclear and wind-power generation between 2007 and 2013, Dominion can avoid a possible refund in 2015 and a rate cut in 2017."[171] As such, the legislation effectively "let [Dominion] deduct about $400 million from its profits and [will] probably avoid issu[ing a rate] refund to customers the next time the [SCC reviews Dominion's balance sheet]."[172]

The General Assembly's 2014 amendment also added language to the 2007 Act, directing that "planning and development activities for a new nuclear generation facility or facilities are in the public interest."[173] This language appears to encourage Dominion

166. S.B. 459, Va. Gen. Assembly (Reg. Sess. 2014) (enacted as Act of Apr. 3, 2014, ch. 541, 2014 Va. Acts ___).

167. *Id.*

168. *See* Peter Bacqué, *Proposed Utility Law Could Have Big Impact*, RICH. TIMES-DISPATCH, Feb. 1, 2014, at A1 (Apr. 19, 2014, 2:36 PM), http://www.timesdispatch.com/business/energy/proposed-utility-law-could-have-big-impact/article_cc13dfaf-dd41-5dc9-846b-880e3ab0547a.html.

169. Rachel Weiner, *Bill Passed by Va. Legislature May Help Dominion Power Avoid Rebates or Rate Cuts*, WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/local/virginia-politics/2014/02/27/9b04f42a-9d9b-11e3-b8d8-94577ff66b28_story.html.

170. *Id.*

171. *Id.*

172. *Id.*

173. Act of Apr. 3, 2014, ch. 541, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 56-585.1(A)(6) (Supp. 2014)).

to continue with construction activities for a third nuclear unit at its North Anna facility.[174]

IV. EFFECTS OF THE 2007 ACT ON ELECTRIC RATES AND ENERGY DEVELOPMENT IN VIRGINIA

A. *Utility Rates of Return*

The 2007 Act's effect on rates is unclear. The electric rates of both Dominion and APCo have risen since 2007 but are not out of line with national averages.[175] Some changes to total electric rates, such as fluctuations in fuel costs, may have occurred independently of the 2007 Act. But it appears that the rates of return authorized by the SCC may have risen in some cases due to the ROE floor provision contained in Virginia Code section 56-585.1(A)(6). As discussed previously, the SCC, on at least one occasion, has awarded a utility a rate of return greater than that which it otherwise would have received due to the ROE floor contained in section 56-585.1.[176] Moreover, elevated ROEs granted to Virginia utilities pursuant to the 2007 Act have caught the attention of national utility analysts. The Edison Electric Institute, for example, reported that the average of utility ROEs jumped due to the ROE increases in Virginia mandated by the Act.[177]

B. *Construction of New Generation Facilities*

The 2007 Act was undoubtedly intended to encourage Virginia utilities to invest in new, utility-owned power generation facilities.[178] In addition to RACs that guarantee the recovery of all construction costs on a timely and current basis, the 2007 Act also contained rate of return bonuses intended to incentivize the con-

174. *See* Bacqué, *supra* note 168.

175. *See* VA. STATE CORP. COMM'N, STATUS REPORT: IMPLEMENTATION OF THE VIRGINIA ELECTRIC UTILITY REGULATION ACT app. 3 at 2 (2013), *available at* http://www.scc.virginia.gov/comm/reports/2013_veur.pdf.

176. *See supra* notes 54–56 and accompanying text.

177. EDISON ELEC. INST., RATE CASE SUMMARY: Q1 2012 FINANCIAL UPDATE 1–2 (2012), *available at* http://www.eei.org/resourcesandmedia/industrydataanalysis/industryfinancialanalysis/QtrlyFinancialUpdates/Documents/QFU_Rate_Case/2012_Q1_Rate_Case.pdf.

178. *See* Brian R. Greene & Katharine A. Hart, *Annual Survey of Virginia Law: Public Utility Law*, 43 U. RICH. L. REV. 295, 303 (2008).

struction of new generation facilities.[179] But while Dominion has constructed numerous new generation facilities in Virginia over the last several years, it is unclear what role, if any, the incentives provided by the 2007 Act played in those investment decisions.[180] In other words, it is unclear whether the rate of return bonuses actually incentivized utilities to construct generation facilities that they would not have otherwise built—or whether the bonuses simply rewarded utility shareholders with additional profits.

1. Dominion

Dominion has received certificates of public convenience and necessity ("CPCNs") pursuant to section 56-580(D) for eight new generation facilities since the passage of the 2007 Act.[181]

179. *Id.* at 303–04; *see supra* Part II(C).

180. *See* AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 42.

181. *See Application of Va. Elec. & Power Co., For Approval of Conversion and Operation of Bremo Power Station*, PUE-2012-00101, 2013 Va. PUC LEXIS 633, Final Order at *20 (Sept. 10, 2013) (natural gas); *Application of Va. Elec. & Power Co., For Approval and Certification of the Proposed Brunswick County Power Station and Related Transmission Facilities Pursuant to §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia, and for Approval of a Rate Adjustment Clause, Designated Rider BW, Pursuant to § 56-585.1 A 6 of the Code of Virginia*, PUE-2012-00128, 2013 Va. PUC LEXIS 813, Final Order at *34–35 (Aug. 2, 2013) (natural gas-fired combined cycle); *Application of Va. Elec. & Power Co., For Approval of a Community Solar Power Program and for Certification of Proposed Distributed Solar Generation Facilities Pursuant to Chapter 771 of the 2011 Virginia Acts of Assembly and §§ 56-46.1 and 56-580 D of the Code of Virginia*, PUE-2011-00117, 2012 Va. PUC LEXIS 703, Order at *24 (Nov. 28, 2012) (solar); *Applications of Va. Elec. & Power Co., For Approval and Certification of the Proposed Biomass Conversion of the Altavista, Hopewell, and Southampton Power Stations Under §§ 56-580 D and 56-46.1 of the Code of Virginia and for Approval of a Rate Adjustment Clause, Designated as Rider B, Under § 56-585.1 A 6 of the Code of Virginia*, PUE-2011-00073, 2012 Va. PUC LEXIS 255, Final Order at *22 (Mar. 16, 2012) (biomass); *Application of Va. Elec. & Power Co., For Approval and Certification of the Proposed Warren County Power Station Electric Generation and Related Transmission Facilities Under §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia and for Approval of a Rate Adjustment Clause, Designated as Rider W, Under § 56-585.1 A 6 of Code of Virginia*, PUE-2011-00042, 2012 Va. PUC LEXIS 8, Final Order at *35–36 (Feb. 2, 2012) (natural gas-fired combined-cycle); *Application of Va. Elec. & Power Co., For a Certificate to Construct and Operate a Generating Facility; For Certificates of Public Convenience and Necessity for a Transmission Line: Bear Garden Generating Station and Bear Garden-Bremo 230 kV Transmission Interconnection Line*, PUE-2008-00014, 2009 Va. PUC LEXIS 226, Final Order at *55 (Mar. 27, 2009) (combined cycle natural gas- and oil-fired facility); *Application of Va. Elec. & Power Co., For a Certificate of Public Convenience and Necessity to Construct and Operate an Electric Generation Facility in Wise County, Virginia, and for Approval of a Rate Adjustment Clause Under §§ 56-585.1, 56-580 D, and 56-46.1 of the Code of Virginia*, PUE-2007-00066, 2008 Va. PUC LEXIS 334, Final Order at *49–50 (Mar. 31, 2008) (coal); *Application of Va. Elec. & Power Co. & Dominion*

In 2008, Dominion began construction of a 600 MW, $1.8 billion coal-fired power plant—the Virginia City Hybrid Energy Center ("Virginia City") facility, in Wise County, Virginia.[182] The 2007 Act included a clause providing that it is "in the public interest" for utilities to build "coal-fueled generation facilit[ies] that utilize[] Virginia coal and [are] located in the coalfield region of the Commonwealth."[183] While the SCC normally determines whether a particular facility would be "in the public interest," the 2007 Act effectively took this decision away from the SCC.[184] Indeed, the SCC noted that it "has no discretion to make a separate public interest determination" because the statute directed that such a facility was in the public interest.[185] The SCC approved a rate of return bonus of 100 basis points because Virginia City was a "'conventional coal' plant" pursuant to section 56-585.1(A)(6).[186]

Dominion has also received CPCNs to construct three natural gas combined cycle facilities in Virginia—the Bear Garden,[187] Warren County,[188] and Brunswick County[189] power stations. Each

Wholesale, Inc., *For Approval and Certification of Electric Generating Facilities Under § 56-580 D and § 56-46.1 of the Code of Virginia and for Approval of Affiliate Transactions Under Chapter 4, Title 56 of the Code of Virginia*, PUE-2007-00032, 2007 Va. PUC LEXIS 742, Final Order at *10–11 (Aug. 24, 2007) (dual fuel gas- and oil-fired turbine generator units).

182. *Virginia City Hybrid Energy Center St. Paul, Va.*, MID-ATLANTIC CONSTR. (2009), http://midatlantic.construction.com/features/archive/2009/summer09_f1_hybridenergycen ter.asp. Virginia City is characterized as a "hybrid" because it is able to burn up to 20% biomass for fuel. *Virginia City Hybrid Energy Center*, DOMINION, https://www.dom.com /about/stations/fossil/virginia-city-hybrid-energy-center.jsp (last visited Oct. 10, 2014).

183. VA. CODE. ANN. § 56-585.1(A)(6) (Repl. Vol. 2007).

184. *See Application of Va. Elec. & Power Co.,* 2008 Va. PUC LEXIS 334, Final Order at *11–12.

185. *Id*. at *12.

186. *Id*. at *39.

187. *Application of Va. Elec. & Power Co., For a Certificate to Construct and Operate a Generating Facility, for Certificates of Public Convenience and Necessity for a Transmission Line: Bear Garden Generating Station and Bear Garden-Bremo 230 kV Transmission Interconnection Line*, PUE-2008-00014, 2009 Va. PUC LEXIS 226, Final Order at *55 (Mar. 27, 2009).

188. *Application of Va. Elec. & Power Co., For Approval and Certification of the Proposed Warren County Power Station Electric Generation and Related Transmission Facilities Under §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia and for Approval of a Rate Adjustment Clause, Designated as Rider W, Under § 56-585.1 A 6 of Code of Virginia*, PUE-2011-00042, 2012 Va. PUC LEXIS 8, Final Order at *35–36 (Feb. 2, 2012).

189. *Application of Va. Elec. & Power Co., For Approval and Certification of the Proposed Brunswick County Power Station and Related Transmission Facilities Pursuant to §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia, and for Approval of a Rate Adjustment Clause, Designated Rider BW, Pursuant to § 56-585.1 A 6 of the Code of Virginia*, PUE-2012-00128, 2013 Va. PUC LEXIS 813, Final Order at *34–35 (Aug. 2, 2013).

of these facilities received a rate of return bonus of 100 basis points.[190] The Bear Garden power plant, a 590-MW combined cycle facility, was completed in 2011 at a cost of over $600 million.[191] The 1329-MW Warren County power plant was approved by the SCC in 2011, at a cost of $1.1 billion and it is expected to enter service in late 2014.[192] Dominion estimates that the Warren County facility will produce enough electricity to power 325,000 homes.[193] Finally, in 2013, the SCC granted approval for Dominion to begin construction of a 1358-MW, $1.27 billion power plant in Brunswick County, Virginia.[194]

In 2012, Dominion obtained CPCNs authorizing the company to convert three small coal-fired power plants to burn biomass fuel.[195] Dominion proposed to convert the three facilities in Southampton, Hopewell, and Altavista, Virginia, as a way to increase the company's renewable energy capacity.[196] The estimated cost of the three conversions was over $150 million, on which the SCC awarded the 200 basis points statutory rate of return bonus.[197] The facilities, which began generating power in late 2013, burn

190. *See id.* at *30; *Application of Va. Elec. & Power Co.*, 2012 Va. PUC LEXIS 8 at *26; *Application of Va. Elec. & Power Co., For Approval of a Rate Adjustment Clause for Recovery of the Costs of the Bear Garden Generating Station and Bear Garden-Bremo 230 kV Transmission Interconnection Line*, PUE-2009-00017, 2009 Va. PUC LEXIS 279, Order for Notice and Hearing at *3–4 (Apr. 21, 2009). Although the General Assembly removed the rate of return adders for new natural gas combined-cycle facilities in 2013, Dominion filed its applications to construct the facilities prior to the law change. *See supra* notes 137–38 and accompanying text.

191. *Bear Garden Power Station*, Dominion, http://www.dom.com/about/stations/fossil/bear-garden-power-station.jsp (last visited Oct. 10, 2014).

192. Peter Bacqué, *New Power Plant Approved in Warren; Resident Customers to Pay About 65 Cents More Each Month*, RICH. TIMES-DISPATCH Feb. 3, 2012, D1.

193. *Warren County Power Station*, DOMINION, http://www.dom.com/about/stations/fossil/warren-county-power-station.jsp (last visited Oct. 10, 2014).

194. *Application of Va. Elec. & Power Co.*, 2013 Va. PUC LEXIS 813, Final Order at *1–2, *34–35.

195. *Applications of Va. Elec. & Power Co., For Approval and Certification of the Proposed Biomass Conversions of the Altavista, Hopewell, and Southampton Power Stations Under §§ 56-580 D and 56-46.1 of the Code of Virginia and for Approval of a Rate Adjustment Clause, Designated as Rider B, Under § 56-585.1 A 6 of the Code of Virginia*, PUE-2011-00073, 2012 Va. PUC LEXIS 255, Final Order at *1, 22 (Mar. 16, 2012).

196. *Id.* at *22.

197. *Id.* at *2, *18.

wood waste, which qualifies as a renewable fuel under Virginia law.[198]

Finally, Dominion's only large-scale wind or solar construction project undertaken to date is a distributed solar demonstration project that will add approximately 30 MW of solar power to the grid.[199] Dominion was also the winning bidder in an auction for the rights to develop wind resources on 112,800 acres of federal land off the coast of Virginia.[200] Dominion has estimated that the land area could support up to 2000 MW of wind turbines.[201] Further, although the company has not yet committed to building a large-scale offshore wind farm, Dominion is going forward with a demonstration project off the coast of Virginia, which will consist of two 6-MW wind turbines.[202] Dominion states that the project is "intended to find ways to lower the cost of offshore wind generation and test technologies and equipment designed to withstand hurricane force winds."[203]

2. APCo

Despite the ability to recover generation costs through a RAC incorporating a rate of return bonus, APCo has not constructed, nor announced plans to construct, any additional generation plants since the passage of the 2007 Act. In 2012, however, APCo did acquire a 580-MW natural gas combined cycle facility located in Ohio.[204] Although APCo did not construct the Dresden power plant, the utility was still authorized to receive a 100 basis points

198. *Biomass Power*, DOMINION, http://www.dom.com/about/stations/renewable/biomass-stations.jsp (last visited Oct. 10, 2014); *see* VA. CODE ANN. § 56-585.2(F) (Supp. 2014).

199. *Application of Va. Elec. & Power Co., For Approval of a Community Solar Power Program and for Certification of Proposed Distributed Solar Generation Facilities Pursuant to Chapter 771 of the 2011 Virginia Acts of Assembly and §§ 56-46.1 and 56-580 D of the Code of Virginia*, PUE-2011-00117, 2012 Va. PUC LEXIS 703, Order at *1–3, *24 (Nov. 28, 2012).

200. *Offshore Wind Power*, DOMINION, http://www.dom.com/about/stations/renewable/offshore-wind-power.jsp (last visited Oct. 10, 2014).

201. *Id.*

202. *Virginia Offshore Wind Technology Advancement Project*, DOMINION, http://www.dom.com/about/stations/renewable/vowtap.jsp (last visited Oct. 10, 2014).

203. *Id.*

204. VA. STATE CORP. COMM'N, STATUS REPORT: IMPLEMENTATION OF THE VIRGINIA ELECTRIC UTILITY REGULATION ACT i (2012), *available at* http://www.scc.virginia.gov/comm/reports/2012_veur.pdf.

rate of return bonus pursuant to section 56-585.1(A)(6).[205] Further, APCo is converting two coal-fired units at its Clinch River facility to burn natural gas.[206]

In 2013, APCo sought to add to its capacity portfolio by requesting SCC approval to acquire interests in two coal-fired power plants in West Virginia.[207] Specifically, APCo requested the SCC's approval to acquire a two-thirds interest in the John E. Amos power plant in Winfield, West Virginia, and a one-half interest in the Mitchell facility in Moundsville, West Virginia.[208] Several parties opposed the proposed acquisitions, including the Attorney General's Division of Consumer Counsel.[209] The utility proposed to purchase the coal units at a total cost of over $1.1 billion, which several parties argued was an excessive cost for old, coal-fired facilities.[210] The SCC ultimately rejected APCo's request to acquire the interest in the Mitchell facility, but approved APCo's acquisition of the remaining interest in the Amos facility.[211] The SCC, in its rejection of APCo's request to acquire interests in both coal units, referenced the "likelihood of increased federal regulation of carbon dioxide emissions from existing coal plants" as a reason why APCo should not invest too heavily in additional coal-fired capacity.[212]

205. *Application of Appalachian Power Co.*, *For Approval of a Rate Adjustment Clause: Rider G, Dresden Generating Plant*, PUE-2012-00036, 2012 Va. PUC LEXIS 798, Final Order at *1, *8 (Dec. 20, 2012).

206. *Application of Appalachian Power Co.*, *For Certificates of Public Convenience and Necessity to Convert Units 1 and 2 of the Clinch River Plant to Use Natural Gas Rather Than Coal as Fuel*, PUE-2013-00057, 2013 Va. PUC LEXIS 983, Final Order at *1, *12–13 (Dec. 20, 2013).

207. *Application of Appalachian Power Co., For Approval of Transactions to Acquire Interests in the Amos and Mitchell Generation Plants and to Merge with Wheeling Power Company*, PUE-2012-00141, 2013 Va. PUC LEXIS 518, Order at *1–2 (July 31, 2013).

208. *Id.*

209. *See id*. at *5.

210. *See, e.g.*, *Application of Appalachian Power Co.*, *For Approval of Transactions to Acquire Interests in the Amos and Mitchell Generation Plants and to Merge With Wheeling Power Company,* PUE-2012-00141, Post-Hearing Brief of the Office of the Attorney General's Division of Consumer Counsel at 43–44 (July 2, 2013), *available at* http://docket.scc.virginia.gov/vaprod/main.asp.

211. *Application of Appalachian Power Co.*, 2013 Va. PUC LEXIS 518, Order at *10.

212. *Id*. at *14.

C. *Clean Energy Development in the Commonwealth*

1. Renewable Portfolio Standard

While Virginia utilities have met their annual renewable energy goals, Virginia's RPS has been responsible for little, if any, renewable energy development in the Commonwealth. A 2012 report by the Office of the Attorney General found that

> [t]he [RPS] adder has not served to advance the environmental concerns that led to its inclusion in the Act because, by and large, [Virginia's] utilities have not built any new renewable facilities to comply with the RPS goals, but instead, have primarily relied on Renewable Energy Certificates (RECs) from pre-existing renewable facilities, including hydroelectric plants that have been in service for more than 80 years.[213]

Neither APCo nor Dominion has constructed a renewable energy facility in order to satisfy the RPS goals.[214] Instead, both utilities have complied with their annual RPS goals primarily through out-of-state REC purchases.[215] As of late 2012, Dominion did not anticipate using any of the renewable energy generated at either of its biomass energy facilities or its new solar energy facilities to satisfy its RPS goals.[216] Instead, those RECs would be sold to other utilities, and Dominion would use lower-cost RECs to satisfy the RPS goals.[217] Environmental advocates have criticized Virginia's largest electric utility, Dominion, for its lack of meaningful investments in new renewable energy generation in Virginia.[218]

213. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at i. Then-Attorney General Cuccinelli also argued that the RPS adder is "outrageously expensive in relation to what we get, which is nothing." Peter Bacqué, *Energy Law Costs Va. Power, APCo Customers $1 Billion-Plus Too Much*, RICH. TIMES-DISPATCH (Nov. 30, 2012, 12:00 AM), http://www.timesdispatch.com/news/energy-law-costs-va-power-apco-customers-billion-plus-too/article_928e09b6-28d3-5eb6-88c6-d58b7eabed65.html.

214. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 15–17.

215. *Id.*

216. *See id.* at 16 n.42 (internal citation omitted). *But see* DOMINION, ANNUAL REPORT TO THE STATE CORPORATION COMMISSION ON RENEWABLE ENERGY 5 (2013), *available at* http://www.dom.com/about/stations/renewable/pdf/renewable-energy-report-2013.pdf ("[Dominion] plans to use existing renewable energy sources . . . to develop new renewable energy generation facilities where feasible, and to purchase RECs to achieve the RPS goals.").

217. AG ROE ENHANCEMENT ADDERS REPORT, *supra* note 30, at 16 n.42.

218. *See, e.g.*, Ivy Main, Op-Ed., *Dominion Power's Wind and Solar Façade*, WASH. POST (Dec. 30, 2011), http://www.washingtonpost.com/opinions/dominion-powers-wind-and-solar-facade/2011/12/29/gIQAB1d8QP_story.html.

2. Energy Efficiency and Demand Response Savings

Although the 2007 Act expressed a 10% energy reduction goal by 2022, Virginia has made relatively little progress towards that goal.[219] The American Council for an Energy Efficient Economy claims that "Virginia has made legislative progress in energy efficiency, however the implementation process has been difficult and as a result the state still falls well below the national average on energy efficiency program spending and energy savings."[220] Since the enactment of the 2007 Act, Dominion has implemented several efficiency programs designed to reduce energy consumption by customers.[221] However, Dominion forecasts that its existing efficiency programs will result in only a 4% reduction in energy usage in its service territory by 2028, well short of the General Assembly's 10% target.[222]

CONCLUSION

It is not yet clear how the 2007 Act, or Virginia's decision to abandon its move toward deregulation, has affected electric rates or the development of new energy resources in Virginia. But as the Commonwealth gains more experience with the 2007 Act, more adjustments to the law seem likely. New environmental regulations, including the Environmental Protection Agency's recently proposed greenhouse gas rules,[223] are also likely to impact the regulation of energy in the Commonwealth. Therefore, if the past is any predictor of the future, it appears there may be only one constant in the future regulation of Virginia's electric utilities: change.

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219. *Virginia Utility Policies*, AM. COUNCIL FOR AN ENERGY EFFICIENT ECON., http://www.aceee.org/sector/state-policy/virginia (last updated Nov. 8, 2013).

220. *Id*.

221. *Id*.

222. This percentage is derived from Dominion's 2013 Integrated Resource Plan. *See In re Va. Elec. and Power Co.'s Integrated Resource Plan Filing Pursuant to § 56-597 et seq. of the Code of Virginia*, PUE-2013-00088, Integrated Resource Plan, at app. 2A, 5E (Aug. 30, 2013), *available at* http://docket.scc.virginia.gov/vaprod/main.asp.

223. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).