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COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION **CASE NO. PUE980812**

Ex Parte: In the matter of establishing interim rules for retail access pilot programs

REPORT OF DEBORAH V. ELLENBERG, CHIEF HEARING EXAMINER

August 6, 1999

Nationwide, electric and natural gas utilities are moving from heavily regulated public utility service to providing energy in a competitive marketplace. As restructuring occurs in Virginia, the Commission, utilities, competitive service providers, and consumers must take, and are taking, steps to ensure that the market develops in a manner that facilitates competition while ensuring service reliability and customer protection.

This case is one of several Commission initiatives to establish fair parameters for that transition. Specifically, this case was established to adopt interim rules to govern certification and standards of conduct to govern relationships among entities participating in retail access pilot programs.

Last year, on March 20, 1998, the Commission entered an order in Case No. PUE980138 which required specific actions necessary to provide information to assist the Commission in electric restructuring. Among other things, the Commission required Virginia Electric and Power Company ("Virginia Power") and American Electric Power – Virginia ("AEP-VA") to prepare retail access pilot programs. Virginia Power and AEP-VA have filed such programs and they are pending hearing in two separate dockets.[1] Codes of conduct, however, are more general in nature and not specific to any one company pilot. Hence, the Commission determined a task force should be established to consider and propose interim rules.

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[1] *Ex Parte: In the matter of considering an electricity retail access pilot program – American Electric Power – Virginia*, Case No. PUE980814 and *Ex Parte: In the matter of considering an electricity retail access pilot program - Virginia Electric and Power Company*, Case No. PUE980813.

In addition, Columbia Gas of Virginia ("Columbia Gas")[2] proposed, received approval for, and implemented its Commonwealth Choice Program. In approving that program, the Commission required a task force to be established to develop a proposed generic code of conduct for retail natural gas programs.[3] Subsequent to approval of the Commonwealth Choice Program, the Commission also approved an experimental firm delivery service program for Washington Gas Light Company ("Washington Gas").[4] Washington Gas and Columbia Gas thus already have ongoing natural gas retail access pilot programs, but the Commission anticipated a generic code of conduct still needed to be established.

The Commission therefore established this proceeding by order dated December 3, 1998, to adopt interim rules to govern issues common to both natural gas and electric retail access pilot programs. The Commission directed the Staff to organize and lead a Task Force to consider those issues and to propose interim rules.

Participants interested in serving on the Task Force advised the Staff Task Force coordinator by December 28, 1998. Fifty-six participants in addition to the Commission Staff representing twenty-eight entities and all segments of the industry participated in the Task Force.[5] Participants representing the electric investor-owned utilities, electric cooperatives, natural gas utilities (collectively "LDCs"); affiliated and non-affiliated competitive service providers ("CSPs"); residential customers; commercial customers; industrial customers; and regulators provided input. Many of the Task Force members already participate in retail access programs in Virginia and other states, and therefore had insightful experiences to offer.

The first meeting of the Task Force was held on January 4, 1999. The Task Force met weekly for eight weeks concluding with final drafting sessions on March 3 and 4, 1999. On March 9, 1999, the Task Force Report was filed.[6] The Task Force Report and proposed interim rules were the product of agreement and consensus when possible and when all participants could

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[2]At the time of the application, the company was Commonwealth Gas Services, Inc.

[3]*Application of Commonwealth Gas Services, Inc.,* Case No. PUE970455, Phase I, 1997 S.C. C. Ann. Rep. 417 (September 30, 1997).

[4]*Application of Washington Gas Light Company for approval of a Pilot Delivery Service Program*, Case No. PUE971024 (June 18, 1998).

[5]Ex. TF-1, at 5; See also Appendix A for the list of the Task Force participants.

[6]The Task Force Report provided definitions of certain terms used throughout its Report. Those definitions are helpful in creating consistent references to particular types of participants in the emerging competitive environment and are included herein as Appendix C. Such common term definitions are helpful to avoid confusion since one participant in the new environment may be referred to by several names. For instance, alternative suppliers are referred to as electric service providers in California, competitive power suppliers in Massachusetts, electric generation suppliers in Pennsylvania, and nonregulated power producers in Rhode Island. (Retail Competition: The Utility Experience in Four States at 11 (Edison Electric Institute, 1999)). The Task Force in Virginia used the term "competitive service providers or CSPs" thus encompassing both electricity and natural gas.

not agree, the Task Force adopted a rule acceptable to some of the participants. The Task Force refrained from making a recommendation on only one issue, treatment of partial payments.[7] The Report included not only proposed rules, but identified some of the different views expressed in the meetings. The proposed interim rules address standards of conduct applicable to all CSPs, for LDCs and their affiliate CSPs, and licensing and filing requirements for retail access pilot programs.

As the Task Force was finishing its work, this case entered its formal process, and notices of intent to participate in this proceeding were filed by 30 parties.[8] Most, but not all, of those parties had also participated on the Task Force. Those parties were invited to submit written comments on the Task Force Report and proposed rules by April 9, 1999. Twenty of those parties filed comments generally supporting the proposed rules set forth in the Task Force Report with limited comments and suggestions for modifications.

Staff also filed comments and a report in which it sought to build upon the work begun by the Task Force. Staff proposed extensive modifications to many of the Task Force rules and eleven new rules.

Apparently surprised by the extensive nature of Staff's modifications to the Task Force recommended rules, twelve parties filed a joint motion seeking time to respond to Staff's proposals. On April 16, 1999, AEP-VA; The Potomac Edison Company d/b/a Allegheny Power ("Allegheny"); Columbia Energy Services Corporation ("CES"); Columbia Gas; CNG Retail Services Corporation; Delmarva Power & Light Company ("Delmarva"); Enron Energy Services, Inc. ("Enron"); A&N Electric Cooperative, BARC Electric Cooperative, Central Virginia Electric Cooperative, Community Electric Cooperative, Craig-Botetourt Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Inc., Northern Virginia Electric Cooperative, Powell Valley Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative and Southside Electric Cooperative, Inc., Old Dominion Electric Cooperative and the Virginia, Maryland & Delaware Association of Electric Cooperatives (collectively the "Virginia Cooperatives"); Virginia Power; Virginia Natural Gas, Inc.; Washington Gas Energy Services, Inc. ("WGES"); and Washington Gas filed a motion seeking the opportunity to file rebuttal testimony and/or comments to the Staff's "extensive and unexpected" recommendations for modification and additions to the Task Force proposed rules. Movants also sought a continuance of the hearing related to Staff comments and testimony and responses thereto.

On that same day, April 16, 1999, a Hearing Examiner's Ruling was issued granting the parties leave to file reply comments and testimony, retaining the scheduled April 19 hearing to receive public comment, and then continuing the hearing for purposes of receiving all prefiled comments and testimony, including but not limited to that of Staff, until May 3, 1999. The

[7]Ex. TF-1, at 6, 33, 34.

[8]See Appendix B for the list of parties filing Notices to Participate in this proceeding.

participants were given one week to file written rebuttal comments to those comments filed by any other party and Staff. Rebuttal or reply comments were filed by 13 participants.

The first hearing was convened on April 19, 1999. Two public witnesses, Merry Beth Hall and Jean Ann Fox, offered testimony. Counsel appeared for 14 participants and included M. Renae Carter, Esquire, counsel for the Commission Staff; Richard D. Gary, Esquire, Karen L. Bell, Esquire, and Kodwo Ghartey-Tagoe, Esquire, counsel to Virginia Power; Anthony Gambardella, Esquire, counsel to AEP-VA; Marlene Brooks, Esquire, counsel to Allegheny; Guy T. Tripp, Esquire, counsel to Delmarva; John A. Pirko, Esquire, and Robert Omberg, Esquire, counsel to the Virginia Cooperatives; Donald R. Hayes, Esquire, counsel to Washington Gas; James S. Copenhaver, Esquire, counsel to Columbia Gas; Michael J. Quinan, Esquire, counsel to Roanoke Gas Company ("Roanoke Gas"); Channing J. Martin, Esquire, counsel to Virginia Propane Gas Association ("VPGA"); John F. Dudley, Esquire, counsel for the Office of the Attorney General, Division of Consumer Counsel ("Consumer Counsel"); Frann Francis, Esquire, and Timothy B. Hyland, Esquire, counsel to the Apartment and Office Building Association of Metropolitan Washington ("AOBA"); Thomas B. Nicholson, Esquire, counsel to the Virginia Retail Merchants Association ("VRMA"); and Edward L. Petrini, Esquire, counsel to the Virginia Committee for Fair Utility Rates and the Old Dominion Committee for Fair Utility Rates (the "Committees").

The hearing continued on May 3, 1999. Additional appearances were entered by C. Meade Browder, Jr., Esquire, who joined Ms. Carter on behalf of Staff; Lawrence K. Friedeman, Esquire, on behalf of CES; Randall S. Rich, Esquire, on behalf of Enron and WGES; and Michel A. King, pro se. At that time, by agreement of counsel, the prefiled testimony of five witnesses, was received into the record without causing the witnesses to come forward and be subject to cross-examination. Those witnesses were: David F. Koogler, Virginia Power; Robert C. Carder, Jr., Allegheny; Greg White and Paul R. Bjorn, the Virginia Cooperatives; and Bruce R. Oliver, AOBA. Three Staff witnesses, Howard Spinner, senior utilities specialist; Kimberly Pate, principal public utility accountant; and Mary Owens, principal financial analyst, offered testimony as a panel. Virginia Power, AEP-VA, Allegheny, Delmarva, the Virginia Cooperatives, Washington Gas Light, Mr. King, Columbia Energy, WGES, Enron, VPGA, Consumer Counsel, AOBA, and VRMA cross-examined the Staff panel of witnesses, and together with Staff also offered oral argument.

Although not appearing on May 3, 1999, to offer oral argument, several of the parties nonetheless participated in the proceeding by providing written comments on the proposed rules.

Notice of the proceeding was marked as Exhibit A and admitted into the record. Transcripts of the hearings have been filed in this case.

I. STATEMENT OF POSITIONS

There were numerous points of contention over these rules, especially after Staff filed its comments and recommendations. Those issues which generated the greatest number of comments included consumer information requirements, the LDC's role in transactions between the CSP and the customer, the level of separation required between an LDC and an ACSP, cost allocation

tracking methodologies, the prohibition of undue preference by an LDC to its ACSP, and treatment of a partial payment. Other issues, however, were also raised and will be discussed below.

The first public witness, Merry Beth Hall, executive director of the Richmond Apartment Management Association, addressed licensure of suppliers. She supported the positions taken by AOBA. She testified that the proposed minimum requirements for licensure of energy service providers and aggregators fail to recognize or accommodate the provisions included in Senate Bill 1269 to free fee management property managers from the burdens and costly requirements of licensure. She noted that fee managers do not take title to the energy as do aggregators, do not resell energy services to end-users as do aggregators, and do not engage in any activities which might require them to collect taxes or provide any service mandated by the Commonwealth as do aggregators. She urged the Commission to establish a blanket exception for fee management companies.[9]

Jean Ann Fox, vice president of the Virginia Citizens Consumer Council ("VCCC"), also offered public comments. She noted that the interim rules at issue will apply to limited pilot programs that are "a laboratory for implementing full retail competition in the gas and electric market."[10] She asserts that the consumer protection measures included in Senate Bill 1269 which go beyond basic bans against fraud and abuse should be the threshold level of consumer protection for the pilots to foster consumer confidence to buy gas and electricity from an alternative energy service provider rather than from the familiar utility company. A second goal should be to foster fair competition, and a third, to prevent the negative side effects of competition, practices such as cramming, slamming or intrusive marketing of products and services. The VCCC generally supports the interim rules included in the Task Force Report,[11] but concurs with the changes advocated by the Consumer Counsel. Ms. Fox also urges modifications to provide twenty-four hour telephone access for emergency service; a rescission period; comparable price disclosures; prohibition of affiliated competitive service providers ("ACSPs") using the utility's name or logo; and prohibition of any affiliate preferences. Ms. Fox also addressed the issue of partial payments. In her opinion, utility service is so important to the health and safety of consumers that "we should error (sic) on the side of keeping the lights and the gas on."[12] She testified that that probably means partial payments must go to the local distribution company first in order to prevent disconnection.[13]

In its comments and report, Staff expressed several initial concerns that it warned may serve to limit supplier and customer participation in electric pilots. Staff observed that eligible customers that choose not to participate will receive service under existing tariffs, and that Virginia electric utility tariffs price electricity relatively close to or below national averages; thus, customers may not have the same motivation to participate in choice programs as in jurisdictions with high rates.

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[9]Tr. 10-14.

[10]Tr. 16.

[11]Tr. 19.

[12]Tr. 26.

[13]Id.

Related to that concern, Staff observed that it may be difficult for competitive service suppliers to formulate offers with sufficient margins to attract them to Virginia. Staff also stated that it currently appears unlikely that Virginia Power or AEP-VA will divest generation assets as both utilities have cost-efficient generation. Maintaining that degree of integration, in Staff's opinion, gives the appearance of both vertical and horizontal market power which also may deter some CSPs from entering a competitive market in Virginia. Staff is concerned that restructuring is beginning in Virginia before the structure and operating rules of a regional transmission entity have been finalized.

Some of Staff's modifications to the Task Force rules, notably those concerning separation and cost allocation procedures, were designed to assure that no preference is provided to ACSPs. Other Staff modifications were intended to incorporate requirements in legislation enacted this year.[14] Yet other recommendations were intended to clarify or build upon the Task Force rules. Staff's modifications and additions will be detailed later in this report.

Staff also observed that adoption of interim rules regarding pilot programs may necessitate changes to the existing programs of Columbia Gas and Washington Gas. Staff recommends that any program changes coincide, to the extent practicable, with each company's filings seeking extension, expansion, or other alteration to the pilot programs. Staff suggests changes necessitated by the interim rules be effective within 120 days following a Commission order adopting rules.

Virginia Power filed the testimony of David F. Koogler on the Task Force Report.[15] Virginia Power has submitted a pilot program for Commission review and approval. That case is currently set for hearing on September 8, 1999. Mr. Koogler in his comments emphasized that many of the Task Force rules are intentionally general because not enough is known about the details and dynamics of retail access at this time to define rules with a significant level of specificity.[16] It is Virginia Power's belief that the pilot programs will clarify the public interest issues that need to be addressed by regulatory rules and provide a basis for greater precision in rules applicable for retail access. Virginia Power specifically commented on: (a) partial payments by customers; (b) the rules regarding separation of the LDC from its ACSP; (c) the allocation of costs between an LDC and an ACSP; and (d) the use of the LDC name and logo by an ACSP.

In rebuttal comments, Virginia Power argued that certain rules and modifications proposed by Staff and other parties go far beyond the focus of a code of conduct, present barriers to competition, increase administrative complexity and decrease the attractiveness of pilots. Virginia Power emphasizes that the Task Force Report was the result of a collaborative process and that due

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[14] 1999 Va. Acts Ch. 411, 494, and 874.

[15] Ex. DFK-2.

[16] Virginia Power Comments at 1.

to the nature and scope of Staff's comments, the entire collaborative process at the center of this proceeding is compromised.[17]

AEP-VA filed comments. It also submitted a customer choice pilot program for Commission review. That case is set to be heard November 9, 1999. Its filing contains a code of conduct and addresses certification of, and standards of conduct for, energy service providers, meter service providers, meter data management agents, and billing agents. AEP-VA generally supports the Task Force proposed interim rules for purposes of its pilot, but clearly states that it may not be able to support similar rules beyond the pilot stage, noting that at least some of the rules will need to be revisited and changed before they will be appropriate for permanent use in a restructured environment.[18] AEP-VA urges the Commission to view the proposed interim rules for pilots as a package, but suggests minor revisions to one specific rule for clarity and provided its perspective on several other rules. Of particular note in that regard, AEP-VA advised that it can assume the role of default supplier during its pilot, in part, because it will continue to be an integrated electric utility providing bundled electric service to the vast majority of its current customers; however, when the incumbent utility becomes an LDC without generation or transmission, it may not be able to serve as the default supplier.

AEP-VA also filed rebuttal comments. AEP-VA emphasized that the proposed rules should guide the conduct of retail access programs rather than attempt to resolve all of the issues that might be encountered as restructuring of the electric and natural gas industries progresses in Virginia. The purpose of a pilot program is to gather information, review, and analyze that information in a controlled environment, to test the effects of the pilot program, and provide remedies and modifications where necessary. AEP-VA encourages the Commission to adopt flexible general rules and add more specificity if necessary as lessons are learned from pilots. It asserts that too stringent rules raise the risk of creating initial barriers to participation to customers and to CSPs. AEP-VA notes that with the exception of Staff's comments, the Task Force participants made remarkably few modifications to the proposed rules. It expressed concern that rules which attempt to answer long-term uncertainties without empirical experience jeopardize the success of restructuring.[19] AEP-VA again emphasized that the Task Force proposals should be considered as a package because they are the product of a collaborative process which included all of the parties best positioned to judge the impact of the rules on their interests and operations.

Allegheny filed the testimony of Robert C. Carder, Jr. Allegheny advised that it does not have a pilot program either ongoing or pending; however, it generally supports the rules, and believes that the interim rules may form the basis of permanent rules which will govern the electric utility industry as it restructures. Delmarva also filed comments supporting the Task Force rules as a balanced approach to promote a workable competitive marketplace.

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[17]Virginia Power Rebuttal Comments at 2.

[18]AEP-VA Comments at 5.

[19]AEP-VA Rebuttal Comments at 4-5.

The Virginia Cooperatives filed comments and the direct testimony of Greg White and Paul R. Bjorn. The Virginia Cooperatives advised that at least two cooperatives are in the process of evaluating and developing proposals for pilot programs in their respective service territories. Several also anticipate participating in retail access pilot programs in Virginia as CSPs. The Virginia Cooperatives assert that due to their structural and operational differences, cooperatives should be given separate consideration in developing rules.

The Virginia Cooperatives note that the 1999 session of the Virginia General Assembly saw the repeal, amendment, and reenactment of the authorizing statutes for Virginia electric cooperatives. House Bill 2438 enacted new sections 56-231.34:1 B and 56-231.50:1 B regarding utility consumer services cooperatives and utility aggregation cooperatives, respectively. Those new provisions require the Commission to "promulgate rules and regulations to promote effective and fair competition between (i) affiliates of electric cooperatives that are engaged in business activities which are not regulated utility services and (ii) other persons engaged in the same or similar businesses." The Virginia Cooperatives assert that the requirements for rules for electric cooperatives implicitly require separate rules.[20] Thus they recommend the distinction required for purposes of the permanent general rules be reserved in the interim pilot rules. If the Commission elects not to promulgate separate rules, however, the Virginia Cooperatives ask that they be liberally granted waivers of standards that need not be applied to cooperatives.[21]

Additional comments were focused on the proposed rules applicable to LDCs. The Virginia Cooperatives addressed four areas of particular concern: partial payment, the separation of functions, the development of cost allocation manuals, and undue preference.

The Virginia Cooperatives also filed rebuttal comments in which they stated that Staff's wholesale editing, restructuring, and amending of the interim rules was unexpected.[22] They expressed concern that Staff raised issues it had not raised before, made editorial changes that had never been suggested, added new rules that had not been offered before, and undermined several parties' confidence in the Task Force process.[23] The Virginia Cooperatives noted that while most participants recognize that whatever interim rules are adopted will influence later more permanent rules, the Task Force made a concerted effort to avoid overloading what are to be interim pilot rules with issues and rules that are neither ripe for, nor germane to, the pilot programs under consideration. The Virginia Cooperatives assert that Staff's proposals represent a marked departure from the Task Force's restrained approach, and include legislative changes which will not be effective until well into or well after the proposed pilot programs have been completed.

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[20]The Virginia Cooperatives Comments at 20.

[21]Id. at 22.

[22]The Virginia Cooperatives Rebuttal Comments at 2.

[23]Id. at 3-4.

Washington Gas also participated in the Task Force deliberations, filed comments, participated in the hearing, and commended the effectiveness of the Task Force process. Washington Gas asserts that the Task Force produced a well-balanced set of proposed interim rules. Washington Gas is one of only two companies in Virginia that currently has an ongoing retail access pilot program in its service territory. Its program was approved by the Commission on June 18, 1998.[24] Gas delivery under that pilot program commenced on January 1, 1999, and currently more than 20,000 of its Virginia customers obtain their gas supplies from service providers other than Washington Gas.[25] Washington Gas notes the Task Force Report suggests that pilot programs and supporting tariffs may require some modification to be consistent with the interim rules finally adopted. Washington Gas supports the inclusion of waiver provisions in the interim rules so that it can seek a waiver if any changes are required in its pilot program that would be administratively burdensome to implement.

In its experience, Washington Gas has concluded that the decision by a CSP to participate in a retail access program is fundamentally an investment decision and that they will participate where potential returns are the greatest. Washington Gas believes the factors that will be considered include the size of the market, the nature of the customer base and associated energy user, perceived fairness of the operating rules applicable to the program, commitment of the utility to the program, and commitment of the state regulatory commission to utility unbundling programs. In its opinion the presence or absence of an ACSP is not a significant factor. Thus, Washington Gas asserts that the focus should be on ensuring that operating rules, including the codes of conduct, are fair.

Washington Gas also submitted reply comments in response to comments and testimony of Staff and the other parties on the Task Force Report. It shares the concerns of other parties with Staff's wholesale revisions.

Roanoke Gas also participated in the Task Force and filed comments to the Report. It expressed its general agreement with the Task Force Report and demonstrated that support with its comments. Roanoke Gas stated that the most important factor to focus on is the delivery of safe and reliable service. Roanoke Gas asserts that the proposed rules set forth in the Task Force Report provide for such service.

In written comments, Virginia Natural Gas Company ("VNG") joined the many other parties to register its satisfaction with the recommendations in the Report; however, VNG focused additional attention on one issue that it contends is critical to the implementation of a successful retail energy choice program, notably, reliability of energy supplies in an environment where the LDC may no longer be exclusively responsible for securing those supplies. VNG notes that in two

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[24] *Application of Washington Gas Light Company for approval of a Pilot Delivery Service Program*, Case No. PUE9701024, Final Order (June 18, 1998).

[25] Washington Gas Comments at 2.

places the rules inadvertently omit reference to natural gas, and it recommends appropriate additions.

Columbia Gas also filed comments on the Task Force Report and rebuttal comments. Columbia Gas also praised the collaborative process of the Task Force. It noted that the participants engaged in open and productive discussions of issues, sought common ground to build a foundation for retail customer choice, and were willing to compromise in order to develop a workable set of rules. Columbia Gas advocates that the Commission adopt the proposed rules without material modification noting that the Report and the proposed rules presented therein are a fair, balanced and equitable set of standards to govern retail choice in Virginia.

As did many participants, Columbia Gas also filed rebuttal comments and stressed the Task Force Report and proposed rules reflect the fruits of a cooperative process and achieved a delicate balance of divergent interests of stakeholders represented in the process. Importantly, Columbia Gas notes that the rules proposed by the Task Force promote retail access, preserve service reliability, and protect consumers without inhibiting the development of the competitive energy marketplace. Columbia Gas asks the Commission to give the Task Force proposed interim rules great weight, and suggests that the Commission should require a compelling reason to modify the Task Force rules in any material respect. Columbia Gas asserts that Staff's proposals, in many respects, are contrary to the public interest as they would increase program costs, increase administrative burdens on stakeholders or deter participation by CSPs and customers without corresponding benefits.

Michel King with Old Mill Power Company also participated in the Task Force and filed comments on the Task Force Report. He expressed general agreement with the Task Force rules and offered comments in support of selected rules of particular interest. He has an interest in participating in the pilot programs as a supplier. Specifically, Old Mill supports a rule requiring a CSP offering unique attributes to provide reasonable support for its claim. Without such a rule, Old Mill asserts that consumers and other CSPs may be harmed by false claims about the true source, fuel content, or emissions of the electricity purchased.

CNG Retail Services Corporation ("CNG") filed written comments, but did not participate in the hearing. CNG also believes the proposed Task Force rules are appropriate overall. CNG asks the Commission, however, to clarify that the proposed rules apply only to commodity transactions. CNG notes that many suppliers are also involved in the sale of non-commodity products and services, but since the Commission has not historically regulated these lines of business the rules should not apply to them.

CES also had comments to offer and participated in the hearing. It is an energy marketing subsidiary of the Columbia Energy Group, and is an active participant in the Columbia Gas pilot program. It also participates in programs in a number of other states including Maryland, Ohio,

Pennsylvania, New Jersey, Georgia, Indiana, and Michigan.[26] CES generally supports the Task Force Report, however, it offered one general comment related to rules concerning affiliate behavior. CES suggests that any rules that prohibit a particular preference should apply equally to all CSPs regardless of affiliate status unless a rule applies to circumstances peculiar to the relationship of an incumbent utility and its affiliate. CES observed that while not perfect, the Task Force proposed interim rules reflect the results of a "remarkable effort expended over a compressed period of time. The process deserves acknowledgement for its egalitarian and respectful nature. Certainly, the participants deserve credit for the sincerity of their efforts."[27]

CES also filed rebuttal comments in response to the Staff's comments. CES joins the voices of other participants opposing Staff's "attempt to craft substantive changes to the proposed interim rules contained in the Task Force Report and to proposed additional rules never discussed within the Task Force forum."[28] CES argues that several of Staff's changes and additional rules are potentially harmful to the development of retail access in Virginia.

WGES, a wholly owned subsidiary of Washington Gas, echoed the resounding support of the collaborative process as an efficient mechanism for bringing together the expertise needed to address restructuring issues. It encouraged the Commission to continue to use this mechanism in the development of other rules. WGES applauded the Commission Staff who led and supported the Task Force, and also commended the Task Force members who contributed to the development of the Report. Overall, WGES supports adoption of the Task Force rules and offered limited comments to seek clarification of certain rules and positions mentioned in the Report and to present WGES's position on partial payments, the unresolved issue. WGES argues that CSPs should not be required to adopt specific or standard offering formats. WGES asserts that telephonic and Internet enrollment can be properly verified and encourages the Commission to assure that the broadest possible mix of enrollment mechanisms is offered. WGES supports the Task Force conclusion that: (1) LDCs should adopt emerging industry standard data and transfer protocols when necessary, (2) affiliate CSPs should not be limited in the use of logos or names of parents, and (3) addresses of eligible customers should be made available to CSPs and thus allow CSPs to contact the broadest range of eligible customers in a cost-effective manner. WGES opposed exempting electric cooperatives from the rules. It contends that to the extent electric cooperatives offer customer choice, the rules should apply.

Enron individually submitted comments on the Task Force Report after active participation in the Task Force. Enron asserts that the Report embodies a workable compromise among the diverse interests that participated in the Task Force and should be adopted without significant modification. Enron added that Commission regulation of gas marketers has never been necessary

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[26]CES Comments at 2.

[27]Id. at 3.

[28]CES Rebuttal Comments at 3.

and such marketers have been providing reliable gas supplies to electric generators and industrial end-users for almost twenty years.

In joint rebuttal comments WGES and Enron emphasized that the Task Force rules were developed through compromises. WGES and Enron assert that a number of the recommendations contained in the written comments submitted by Staff and other parties are rules that were either not discussed during Task Force deliberations, were discussed and rejected, or would otherwise substantially modify the Task Force rules, and would be detrimental to pilot programs in Virginia and the evolution of retail choice.

VPGA also participated in this case. It is a trade association with approximately 250 members engaged in the sale and distribution of propane gas and the sale and service of propane gas equipment in Virginia. It supports the code of conduct established in the rules because its members are concerned about undue advantages and preferences regulated utilities otherwise could provide to unregulated affiliates.

The Consumer Counsel also supports the rules proposed in the Task Force Report with certain modifications. Specifically, he notes that the rules will be interim and may require revision or addition as we gather experience in retail access. He observes, for example, that more detailed cost accounting procedures and affiliate codes of conduct may be needed to adequately protect against cost shifting, cross subsidies and affiliate dealing; bonding requirements may need to be increased for full customer choice; more stringent anti-slamming protections may be required; and unregulated affiliates may need to be precluded from utilizing the logo of a regulated entity. The Consumer Counsel also anticipated arguments that the rules may not be necessary in light of the Virginia Consumer Protection Act; therefore, he stressed that those general provisions are not a comprehensive substitute for specific Commission rules governing consumer transactions in a newly created market.[29]

The Consumer Counsel also filed reply comments responding to other parties. He notes that the restructuring statutes explicitly require the Commission to address, among other things, consumer protection, marketing and billing, supplier licensing, affiliated relationships, and codes of conduct.[30] The Consumer Counsel urges pilot programs established by the Commission and the interim rules to be consistent with the authority provided in the restructuring statutes. He recommends the Commission reject Allegheny's suggestion that the rules addressing the relationship between CSPs and customers only apply to residential customers, noting that no distinction is made in the statutes. The Consumer Counsel also urges the Commission to reject the blanket exemption for any particular class of suppliers or aggregators as urged by AOBA. Waiver provisions are included in the Task Force rules, and provide that waivers should be granted on a case-by-case basis. The Consumer Counsel urges the Commission to retain that requirement.

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[29]Consumer Counsel Comments at 3.

[30]Consumer Counsel Reply Comments at 2.

AOBA filed comments and the testimony of Bruce R. Oliver. Mr. Oliver's testimony focused on: (1) the relationship between an LDC and ACSPs, (2) the need to differentiate the treatment of building management firms who act on behalf of landlords to procure generation services, from that of other CSPs who offer services to a broader range of customers, and (3) a need to take greater steps to ensure competition for renewals of service as the initial contract period approaches its conclusion. Mr. Oliver testified that the proposed Task Force rules appeared reasonable and appropriate with only a few exceptions.

VRMA also largely supported the rules as a reasonable accommodation of competing interests. It however was concerned that any potential for regulatory gaps between state and federal regulation be addressed.

Both the Virginia Committee for Fair Utility Rates ("Virginia Committee") and the Old Dominion Committee for Fair Utility Rates ("Old Dominion Committee") consist of large industrial customers of Virginia Power and AEP-VA, respectively. The Committees agree that the interim rules provide a good starting point for implementing customer choice pilot programs in Virginia. However, the Committees believe the Commission should consider modifying the rules to permit the Commission greater flexibility, encourage competition, and address the needs of Virginia's larger energy consumers and suppliers. They suggest the application of licensure requirements to aggregators and energy service providers that market services exclusively to large industrial consumers may not be necessary in view of the consumers' greater knowledge of energy markets, aggregators, and suppliers.

II. GENERAL DISCUSSION

Although industrial consumers have been purchasing natural gas from companies other than their local distribution companies for almost twenty years in Virginia, retail access for all consumers in the natural gas and electric power industries is only now on the horizon. Many have been hard at work to develop the parameters within which a long regulated service will transition into a restructured and competitive environment. Certainly the Commission has a new directive to facilitate meaningful competition in Virginia. The guiding principle during the transition, however, must continue to be consumer protection. Thus, the Commission, its Staff, consumer representatives, and industry representatives have and will continue to labor long and hard to achieve an efficient competitive marketplace while continuing to guard against unfair practices.

The 1999 General Assembly also focused much of its time and energy on restructuring issues. It enacted Senate Bill 1269, The Virginia Electric Utility Restructuring Act of 1999[31] (the "Electric Restructuring Act") that provides a schedule for all customers to be allowed to purchase electricity from the provider of their choice. Retail access under the Electric Restructuring Act will begin on January 1, 2002, and be completed by January 1, 2004. The Commission has the ability to

[31] 1999 Va. Acts Ch. 411; Virginia Code §§ 56-587 et seq.

delay the full implementation to January 1, 2005, due to considerations of reliability, safety, and market power. The Electric Restructuring Act places responsibility on the Commission to: (1) license suppliers and aggregators; (2) prohibit cost shifting, cross subsidies, self dealing, and discriminatory behavior; (3) establish codes of conduct; (4) develop consumer education programs; (5) regulate marketing and billing practices; and (6) maintain a complaint bureau and inquiry into possible violations.[32]

The General Assembly also enacted Senate Bill 1105[33] which authorizes natural gas utilities in Virginia to offer retail supply choice to all customers. Retail access plans for natural gas companies will begin July 1, 2001. The legislation provides that those plans should contain a schedule for implementation of choice for all customers, terms and conditions which provide non-discriminatory open access, a code of conduct designed to prevent anti-competitive behavior and any other requirements established by the Commission. That law, however, expires on July 1, 2000, and thus will require further legislative action to remain in force after that date. It also requires licensure of all persons proposing to furnish competitive services.

House Bill 2438,[34] also enacted, replaces previously effective statutes addressing electric cooperatives with the Utility Consumer Services Cooperatives Act[35] and the Utility Aggregation Cooperatives Act.[36] Those Acts recognize and address some of the unique characteristics of electric cooperatives in a restructuring environment.

The incumbent utilities have also moved forward to embrace the challenges of a new way of doing business. Experimental programs providing limited retail access have begun in Virginia. Both Columbia Gas and Washington Gas have Commission-approved pilot programs underway. The information garnered from those programs will be critical to a long-term implementation of an efficient competitive marketplace.

To facilitate development of a balanced set of interim rules in this case, the Commission relied on a collaborative process. Members of the Task Force that participated in this proceeding emphasized, without exception, the importance of the collaborative effort and cooperative spirit shown by all members of the restructuring effort. An overwhelming majority of participants also argued that extensive modification would disrupt the delicate balance of interests achieved by the Task Force proposed rules. Many parties noted that the effect of major revisions could also have a negative impact on other collaborative efforts currently underway. Collaborative efforts currently are underway to develop a consumer education program as required by Virginia Code § 56-592.

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[32]Virginia Code §§ 56-587 et seq.

[33]1999 Va. Acts Ch. 494; Virginia Code § 56-235.8.

[34]1999 Va. Acts Ch. 874; Virginia Code §§ 56-231.15 et seq.

[35]Virginia Code §§ 56-231.15 et seq.

[36]Virginia Code §§ 56-231.38 et seq.

That statute requires the Commission to develop and propose a statewide education program by December 1, 1999. Another collaborative effort currently underway addresses standardized electronic data interchange ("EDI") among suppliers and LDCs.

The Task Force interim rules reflect a concerted effort on the part of the participants to seek and find common ground, to establish a workable framework for retail access pilots to serve as the foundation for a competitive energy market in Virginia. The collaborative process is a reasonable way to balance the interests of all participants as they are best postured to determine what positions are critical and what can be subject to compromise.

I was impressed by the overwhelming show of support for the interim rules proposed as a result of that collaborative process in this case and the equally overwhelming disappointment with the magnitude of Staff changes. I appreciate that every party, and especially Staff, offered modifications on those rules which, from the party's view, could be improved. I expect the parties were not so much surprised as disappointed in Staff's recommendations. Indeed, Staff has an obligation to advise the Commission of changes it believes would better serve the public interest. However, in this case I agree that flexibility in these interim rules is important to allow pilot programs freedom to explore what works and what does not work. To that end, I also agree that the product of the concerted effort of the Task Force should be afforded great weight and modified only when deemed necessary.[37]

The interim rules of conduct for pilot programs adopted herein must strike a difficult balance. They should not impose overly burdensome requirements that will impact CSPs' decisions to participate in Virginia programs, but they must adequately protect consumers. It is also important that the policy concerns underlying the statutes be addressed even in the context of a pilot; however, it should be remembered that these proposed interim rules are strictly for pilots. The rules adopted in this case therefore will be short-lived and applicable to experimental programs where retail access is limited to a small group of consumers. The complex nature of the restructuring of the energy industry requires flexibility in the pilots to allow the process to move forward while the initial guidelines established herein can, and certainly will, be modified with experience.

[37]Appendix D shows the additions and deletions which I recommend to the Task Force proposed interim rules set forth in Ex. TF-1.

III. PROPOSED INTERIM RULES GOVERNING COMPETITIVE SERVICE PROVIDERS

The first set of rules (20 VAC 5-311-10.) defines the relationships between CSPs and consumers, and CSPs and the LDCs and transmission providers. The objective of the Task Force in drafting the rules in this section was to promote a competitive marketplace in which consumers electing to participate in pilot programs could make informed choices among numerous CSPs. The proposed rules are also intended to protect system reliability and offer an appropriate level of consumer protection.

In the Task Force, the LDCs generally favored such rules, while the CSPs asserted that existing law, such as the Virginia Consumer Protection Act of 1977,[38] adequately protects relationships between suppliers and consumers. The CSPs, however, recognized that the new Virginia legislation requires some additional level of consumer protection. Ultimately the CSPs generally did not object to these rules.

Consumer participants support rules to allow informed comparison shopping and further, to prevent fraud. Staff offered numerous modifications to this set of rules. Staff argued that the proposed interim rules are intended to promote an orderly and well-functioning pilot competitive marketplace and at the same time provide consumer protection by specifying certain requirements and obligations to guide CSP behavior. Staff expressed a particular concern about the type and accuracy of customer solicitation materials received by customers.[39]

Specific consumer protection rules are particularly necessary in the transition away from delivery of a regulated commodity and service. The rules should ensure that clear and understandable customer information is disseminated in pilot programs, prevent fraud, advise customers where to take questions and complaints, safeguard and protect customer privacy, and preserve system reliability. Moreover Virginia Code § 56-592 reflects an expectation that the Commission will take an active consumer protection role.

Of a general concern, Allegheny seeks clarification of whether the "retail customer" covered by this section includes all customers or only residential and small commercial customers. Allegheny asserts that many of the customer protection rules proposed should apply only to residential customers. Yet, it recognizes other rules may apply appropriately to all customers. The Committees also argue that large industrial consumers are capable of negotiating their own agreements with suppliers, and add that they have been acquiring gas supplies in a competitive market for more than a decade.

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[38]Virginia Code §§ 59.1-196 et seq.

[39]Ex. Staff-7, at 8.

The Consumer Counsel and Staff disagreed and urge the Commission to apply the rules to all customers.

I agree. The rules should apply for all customers initially. As a number of parties repeatedly reiterate, these rules will govern pilot programs. Pilot programs are necessary to learn more about retail access for all customers. The new relationships which will be forged in this dramatically changing environment require well-articulated but flexible ground rules. With more information on consumer group behavior in a restructured environment, the Commission may ultimately determine it is necessary to protect only residential or small commercial consumers. However, during the pilots the rules should apply to all customers.

A. Proposed interim rules applicable to relationships with retail customers

Task Force Proposed Interim Rule 10.A.1.

> ***A competitive service provider shall provide accurate, understandable customer solicitation and marketing materials and customer service contracts which include clear pricing terms and conditions, term of customer contract and provisions for termination by either the customer or the competitive service provider.***

Task Force participants generally agreed that customers should receive accurate solicitation and marketing materials. However, there was considerable discussion in the Task Force meetings over whether this rule was even necessary, or whether it should include more specific protections. Some participants believed that the existing consumer protection laws adequately addressed any concern with customer disclosures. Indeed, existing laws[40] prohibit misrepresentation of goods or services, deceptive advertising, and other fraudulent acts or practices relative to consumer transactions. Consumer advocates seek a rule requiring CSPs to provide customers with comparable information in a standard format so that they can make informed shopping decisions. They support a rule requiring "apples to apples" comparisons.

The Task Force proposed a broadly worded rule as part of the collaborative process.[41]

Staff proposed modification to the rule to provide more specific reporting requirements to enable consumers to make more informed shopping decisions. Staff's proposed rule requires much more detail, requiring at a minimum, a brochure, a three-business day rescission period, and billing

[40]Virginia Code §§ 59.1-196 et seq.

[41]Ex. TF-1, at 11.

rates at designated usage levels. Staff recommends the Task Force rule be replaced with the following:

> *A competitive service provider shall develop and provide to customers as soon as practicable after any solicitation a customer information brochure. Such a brochure will, at a minimum, provide accurate, understandable customer solicitation and marketing materials and customer service contracts that include clear pricing terms and conditions, length of customer contract and provisions for termination by either the customer or the competitive service provider. Such a brochure will advise any prospective customer of a three-business day rescission period during which a customer may withdraw from any contract with a competitive service provider without penalty. This three-day rescission period shall begin upon receipt of the customer information brochure by the customer. Solicitations and associated customer information brochures offered to residential and small commercial customers shall include:*
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> *a. For electric service, a schedule which displays all applicable billing rates and typical monthly bills for usage levels ranging from 500 kWh to 2500 kWh in increments not greater than 500 kWh. Incentives that will not affect the customer's monthly bill shall be excluded from this schedule. For purposes of this rule, residential and small commercial customers are those with projected monthly usage less than 3000 kWh.*
>
> *b. For natural gas service, a schedule which displays all applicable billing rates and typical monthly bills for usage levels ranging from 5 mcfs to 20 mcfs in increments not greater than 5 mcfs. Incentives that will not affect the customer's monthly bill shall be excluded from this schedule. For purposes of this rule, residential and small commercial customers are those with projected monthly usage less than 25 mcfs.*

Due to the uncertainty over how the market will function, Staff believes that it is necessary to develop more specific consumer information criteria. Staff argues that its proposed rule provides consumers with basic protections. Staff acknowledged that it is trading off some level of CSP innovation. It notes that in the future it may be appropriate to remove standard format requirements. At this juncture, however, Staff asserts that since consumers will be asked to make choices that they have never made before, they should be provided with sufficient information in a comprehensive, accurate, clear and easily comparable format, at least for residential and small commercial customers.[42]

Jean Ann Fox testified as a public witness and agreed with Staff, arguing that credit card providers are required to include specific standardized information in their offers. She observed that standardizing minimum comparisons in those offerings has not stifled the creativity of credit

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[42]Ex. Staff-7, at 13.

card solicitations. Ms. Fox contends that customers need information to use in comparing offers so that they can make informed choices. The Consumer Counsel offered similar comments and concerns.

Utilities and CSPs generally opposed Staff's modifications. Several members of the Task Force expressed concern with the specific disclosure requirements, asserting that standardized formats would limit the ability of CSPs to make creative offerings. They seek flexibility to offer innovative products and services.

Allegheny complains that Staff replaces a straightforward and concise Task Force rule on customer solicitation with nearly a full page of requirements for brochures containing elaborate schedules describing billing rates and typical monthly bills at various levels of usage. Allegheny asserts that Staff's proposal is much too detailed and restrictive, and requires specific or standard offering formats which Allegheny opposes. It argues that CSPs want and need flexibility to offer innovative products and services without having to state price in a standardized format. Allegheny claims benefits will result from innovation in pricing services, but not if the CSPs are precluded from offering them.

AEP-VA also objects to Staff's proposal. It objects to the recommendation to give all customers, regardless of size or sophistication, an information brochure with standard information. AEP-VA asserts that a requirement to provide a standardized billing schedule would stifle competition and creativity. AEP-VA is also concerned that such a requirement would discourage CSPs from seeking to serve smaller customers.

Washington Gas supports the proposed Task Force rule which requires CSPs to provide accurate and understandable customer solicitation and marketing materials, and customer service contracts with clear pricing terms and terms and conditions of service, including provisions for termination of service. Washington Gas opposes the expanded rule proposed by Staff because it believes the additional requirements will make Virginia pilot programs less attractive to CSPs and make them less likely to participate, ultimately reducing choices for the customers. In particular, Washington Gas believes that a requirement to include marketing brochures with a schedule showing billing rates at typical usage levels will make participation more burdensome and costly, limit the range of service and pricing options, and may even be impossible to comply with if a CSP offers service at market rates.

Columbia Gas asserts that Staff's proposal assumes that customer information brochures are necessary to an effective marketing campaign. Columbia Gas notes that there are numerous ways to communicate with customers including nonprint media such as telephonic information or Internet-based websites. It argues that Staff's proposal could stifle marketing creativity and preclude CSPs that do not intend to produce marketing brochures. Similarly, it contends that Staff's proposal would stifle creativity in pricing by requiring uniform pricing provisions. Columbia Gas reported that in its pilot program, it has experienced a great many pricing variations. Some providers have

offered fixed prices, one CSP offers free gas during summer months, and others offer signing incentives.[43]

CES asserts that the Staff proposed rule is radical in its requirements to format solicitation material. CES argues that the complexity of the required schedule of applicable billing rates and typical billing months will confuse customers and create consumer expectations that may or may not be applicable.[44] CES also asserts that format requirements that drive selection based on price only will stifle competitive creativity and ultimately disadvantage the consumer.

WGES and Enron assert that Staff's proposed modifications overreach. They assert that Staff's rule would effectively regulate marketers by mandating posting prices in a standard offering. They contend that Staff's communications prescriptions would increase costs to suppliers and hence to consumers, produce a complicated and confusing solicitation process, and narrow customer choice.

I recommend adoption of the Task Force rule with modification. CSPs should have flexibility to offer innovative products and services. A requirement to provide a brochure is overly restrictive. There are other means to disseminate marketing information, several nonprint options were described by the participants. However, as the Task Force Report stated, "[c]onsumer education is the underpinning of informed choice."[45] In my opinion some type of comparable price information is necessary to allow consumers to effectively shop for their energy requirements. Certainly price is not the only basis upon which a consumer should make its purchasing decision, but, as it is with most commodities and for most consumers, price is the most important factor. Ms. Fox persuasively observed that standardized pricing information has not stifled the creativity of credit card offers. A limited requirement to allow consumers to more readily compare offers should not limit creative options. If a provider offers a flat fee or free summer gas supply, it can readily be factored into a price comparison. Moreover, a CSP can promote other aspects of its offer. If comparable information is impossible to calculate, a provider can appeal to the Commission through the waiver provisions in these rules.

Staff's proposal, however, requires multiple usage levels for electric and gas offers. Such a multi-faceted requirement may be confusing and defeat the purpose of a comparable price requirement. I therefore recommend the CSPs be required to only include the estimated monthly bill for an average residential customer who consumes 1,000 kWh of electricity or 7.5 Mcf of natural gas in their solicitation materials. Each CSP is also encouraged to fully identify any other factors that should be considered by the consumer to cause them to select the soliciting CSP over any others. A limited price comparison should benefit customers shopping in a new market, but should not unreasonably limit the flexibility of CSPs to try innovative pricing proposals.

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[43]Columbia Gas Rebuttal Comments at 7.

[44]CES Rebuttal Comments at 4.

[45]Ex. TF-1, at 11.

Staff also recommends a mandatory three-day rescission period to allow customers an opportunity to cancel a new contract with a CSP.

The Consumer Counsel similarly recommended a new rule to provide customers with the right to cancel a contract with a CSP within a rescission period approved by the Commission, and he recommends a five-day rescission period. He proposes the following language: "[a] competitive service provider must permit a customer to cancel, without penalty or cost, any contract entered into with a competitive service provider, within a period of time approved by the Commission."[46] The Consumer Counsel, however, does not object to any of Staff's recommended modifications.

Ms. Fox emphasized that consumers are not used to shopping for electricity or gas. She urges the Commission to experiment with the right to cancel now rather than wait until full retail choice is implemented.

WGES submits that a mandatory rescission period is unfair and unwarranted for sales in extremely volatile energy markets. It asserts that it is unfair for CSPs to honor prices for days while customers shop. WGES and Enron urge the Commission to reject the modification suggested by Staff and the Consumer Counsel.

AEP-VA argues that if a cancellation period is found to be appropriate, it should be limited to the residential class or be flexible enough to allow for differences among customer classes. AEP-VA asserts that the requirement is simply not necessary for industrial or large commercial customers. The Virginia Cooperatives assert that Staff's proposal for the rescission period to begin upon the customer's receipt of the customer information brochure provides an indefinite commencement event for what should be a well-defined rescission period. The Virginia Cooperatives assert that the period should begin upon the occurrence of a more definite recordable event.

I support the recommendations of the Staff and the Consumer Counsel and find that a rescission period should be incorporated into the interim rules. Virginia Code § 56-587 C.1 explicitly requires the Commission to "establish a reasonable period within which any retail customer may cancel, without penalty or cost, any contract entered into with a supplier licensed pursuant to this section." Although that statutory requirement need not be applied to experimental pilots, Ms. Fox explained it well when she observed that "[t]here's no point in experimenting with a lesser level of consumer protections than will apply to the competitive market."[47] Staff's recommended three-day period is reasonable and should be incorporated into the Task Force rule.

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[46]Consumer Counsel Comments at 5.

[47]Tr. 16.

Therefore, I recommend the following changes to the Task Force rule:

10.A.1. A competitive service provider shall provide accurate, understandable customer solicitation and marketing materials and customer service contracts which include clear pricing terms and conditions, <u>including an estimated monthly bill for a residential consumer using 1,000 kWh of electricity or 7.5 Mcf of natural gas,</u> term of customer contract~~, and~~ provisions for termination by either the customer or the competitive service provider<u>, and a three-day rescission period for the customer.</u>

<u>Task Force Proposed Interim Rule 10.A.2.</u>

A competitive service provider claiming its offerings possess unique attributes shall be required to provide reasonable support for the claim.

Suppliers in some states have offered "green" electric generation produced from renewable or other environmentally friendly sources. Although the CSPs assert that existing consumer protection laws should safeguard consumers from misleading claims, they nonetheless do not oppose the Task Force rule drafted to prevent fraud or misleading claims and place the burden of supporting the marketing claims on the CSP.

Staff proposed revised language. It seeks to incorporate the statutory requirement that suppliers disclose their fuel mix to the extent possible. Specifically:

> *A competitive service provider shall provide documentation upon request to the Commission and to customers that substantiates any claims made by the competitive service provider regarding the technologies and fuel mix used to provide competitive energy services offered or sold to customers. All electric service competitive service providers shall disclose to customers and the Commission, to the extent feasible, fuel mix and emissions data on at least an annualized basis.*

Delmarva suggested adding the phrase "upon request" to the rule to clarify the circumstances under which support for a claim must be made. It observes that detailed support for environmental claims in each piece of advertising would not be practical.

Allegheny is not in favor of requiring generation providers to disclose sources of generation for purposes of assessing claims such as "green power," but it supports the Task Force rule as a realistic and viable alternative to such a requirement. Allegheny opposes Staff's recommendation that all CSPs disclose, to the extent feasible, fuel mix and emissions data on at least an annualized basis. Although recognizing the recently passed legislation does contain a requirement that fuel mix and emissions data be disclosed, Allegheny asserts that requiring disclosure in the pilots may present a difficulty that keeps CSPs from participating.

WGES and Enron also urge the Commission to reject Staff's expansion of the rule as unwarranted. They note that electric utilities have not had to provide such detailed documentation.

Moreover, they argue that unless the marketer owns the generator to which the requested data would pertain, it will be difficult for the CSP to secure the technical data in the possession of the generation owner or operator. WGES and Enron support Delmarva's proposed change as a useful clarification.

Old Mill specifically supports the Task Force rule to avoid misleading consumers.

I also support the Task Force rule as clarified by Delmarva with one addition. I agree with Staff's recommendation to incorporate the statutory provision that requires information on fuel mix and emissions data **to the extent feasible**. If the information is not available from the generator or is difficult to secure for whatever reason, the CSP need only advise the Commission that it cannot feasibly provide it. Virginia Code § 56-592 D.4 requires the Commission to establish billing information standards that require disclosure "to the extent feasible, fuel mix and emissions data on at least an annualized basis." Again, the statutory standard does not necessarily apply to experimental pilots, but as discussed above, it is more productive to gather information through pilots that includes the minimum statutory requirements and that will provide valuable insight to aid in the long-term implementation of retail access. Moreover, by incorporating the requirement in these rules, the Commission may be able to learn more about circumstances in which the production is and is not feasible.

I recommend the Task Force rule be modified as follows:

10.A.2. A competitive service provider claiming its offerings possess unique attributes shall be required to provide, upon request, reasonable support for the claim. All electric service competitive service providers shall disclose to the Commission, to the extent feasible, fuel mix and emissions data on at least an annualized basis.

Task Force Proposed Interim Rule 10.A.3.

A competitive service provider shall have in place explicit dispute resolution procedures and clearly identify the addresses and phone numbers of persons authorized to assist customers when they have a complaint.

The Task Force recognized that customers will have questions as they move into the competitive marketplace for energy services. It recommends this rule to provide a clear process for resolution of disputes.

Staff proposes to modify the Task Force Rule to require the CSP to identify a "company employee" rather than "a person." Staff also would require the CSP to make the dispute resolution procedure available to its customers, and offered the following rule:

> *A competitive service provider shall provide to the Commission and to its customers a dispute resolution procedure and clearly identify the addresses and phone numbers of company employees authorized to assist customers with complaints.*

Columbia Gas notes that requiring identification of an employee precludes agents or contractors of a CSP from serving as initial contact, is unjustified, and may require a contact person to be added to a CSP's payroll.

Staff's proposed changes are unnecessary. It is not necessary to require broad dissemination of a dispute resolution procedure as long as a procedure is in place and made known to customers when disputes arise. Further, CSPs should have the ability to retain an agent or contractor, particularly in limited pilots, rather than potentially bear the additional expense of adding an employee. I support the Task Force rule. Thus this rule would read as follows:

10.A.3. A competitive service provider shall have in place explicit dispute resolution procedures and clearly identify the addresses and phone numbers of persons authorized to assist customers when they have a complaint.

Task Force Proposed Interim Rule 10.A.4.

A competitive service provider shall furnish to customers a toll-free telephone number for customer inquiries during normal business hours regarding services provided by the competitive service provider.

Staff recommends changes to provide a twenty-four hour phone number for inquiries and to require certain inquiries to be directed to the LDC after normal business hours.

A competitive service provider shall furnish to customers a toll-free telephone number for customer inquiries during normal business hours regarding services provided by the competitive service provider. After normal business hours, a recording or answering service shall advise customers to direct any outage, service, safety or local distribution company billing issues to the local distribution company.

The Consumer Counsel recommends that the toll-free number be available twenty-four hours and directs customers where to call for help in a service emergency. He suggested the rule read as follows:

A competitive service provider shall furnish to customers a 24-hour toll-free telephone number (1) for customer inquiries during normal business hours regarding services provided by the competitive service provider, and (2) that directs the customer where to call in a service emergency.

During non-business hours, the Consumer Counsel suggests that a prerecorded message could be used to inform customers where to call in an emergency.

The added requirement for twenty-four hour service was acceptable to both WGES and Enron as they already provide the increased level of service imposed by the proposed change.

AEP-VA, while not objecting to a requirement for a 24-hour phone number, asserts that several Staff changes place the LDC between the customer and CSP. AEP-VA is concerned that customers may view the LDC as an agent for customers in dealings with the CSP, particularly after normal business hours.[48] AEP-VA also states that if any revision is adopted, the proposal suggested by the Consumer Counsel is more general and less problematic.

I agree and will adopt the Consumer Counsel's recommended language. It is reasonable and even necessary to provide the consumer with twenty-four hour contact information for service emergencies, but it should not be presumed that such contact must be the LDC. To the contrary, the customer must learn that the LDC is not party to the contractual relationship between the CSP and the customer. Similarly, although the CSP must clearly have a working relationship with the LDC, the CSP cannot assume that the LDC will provide it with after hours support. Thus I recommend the following rule:

10.A.4. A competitive service provider shall furnish to customers a <u>24-hour</u> toll-free telephone number <u>(1)</u> for customer inquiries during normal business hours regarding services provided by the competitive service provider<u>, and (2) that directs the customer where to call in a service emergency</u>.

<u>Task Force Proposed Interim Rule 10.A.5.</u>

A competitive service provider shall enroll a customer only when properly authorized by that customer and such authorization is appropriately verified.

The Task Force proposed this rule to address program enrollment. Staff, however, proposed to place the LDC in the enrollment process to protect against unauthorized switching. It proposes to substitute the following:

No competitive service provider shall enroll or switch a customer until the customer has contacted the local distribution company to authorize the enrollment or switch.

The Consumer Counsel supports Staff's recommendation. He agreed that a customer should contact the LDC to switch from the LDC to a CSP or to switch from one CSP to another, thereby minimizing the opportunity for unauthorized switching or slamming.

Virginia Power asserts that Staff's proposed rule is unnecessary and may have the unintended consequence of: (1) causing consumer confusion, (2) imposing significant administrative burdens on the utility, (3) placing the LDC in the middle of the business relationship or contract between a CSP and its customers, (4) causing consumers to lose potential savings as greater costs are incurred, (5) and providing no audit trail for at least part of the enrollment

[48] AEP-VA Rebuttal Comments at 7.

transaction.[49] Virginia Power suggested there are more effective ways to minimize slamming. In its pilot, Virginia Power has proposed to send notification to a customer and its CSP when it receives an electronic enrollment transaction from a second CSP indicating the customer has authorized the switch to that second CSP. If that switch was unauthorized, the parties that need to address it have been properly notified. Virginia Power interprets the Task Force rule which requires enrollment to be "appropriately verified" to require a written or recorded verification with an original signature or a voice recording that can be produced in response to a slamming complaint. Virginia Power notes that in four states that have implemented retail access, California, Massachusetts, Rhode Island and Pennsylvania, responsibility for maintaining records and supervising switching has been given to the CSP. In an EEI report, it is noted that "[a]lthough utilities in states such as Pennsylvania were in favor of. . . . serving as gatekeepers, they soon realized that the amount of recordkeeping and monitoring required would be significant and that they would be liable for any problems with switching."[50]

AEP-VA also objects to Staff's proposal to make the LDC the exclusive point of contact for purposes of switching service. AEP-VA asserts that those matters are more properly between the customer and the CSP. AEP-VA asserts that such a requirement would be administratively burdensome, require many additional electronic exchanges of information, could cause delays in enrollment, and would be confusing and troublesome to customers and suppliers.

Allegheny asserts the same objection to the requirement that customers contact the LDC to authorize enrollment for switches. Allegheny added that in its experience in Pennsylvania, customers are only required to give their authority to the selected supplier in order to switch. That supplier then notifies the LDC via electronic data interchange. Allegheny asserts that such a procedure works well in Pennsylvania and electronic data interchange of service changes provides a good mechanism for tracking problems.

Washington Gas also asserts that actual customer contact with the LDC is not necessary to prevent unauthorized enrollment or switching between suppliers. Again, Washington Gas supports the proposed Task Force rule because it believes that a requirement that customers contact the LDC before enrollment or switching will make the solicitation programs more costly and less effective, and in turn less attractive to CSPs, thereby reducing choices for customers. Further, Washington Gas asserts that the requirement would impose a significant burden on the LDC in administering pilot programs. Washington Gas opposes a rule that would transfer the verification function to the LDC. Washington Gas asserts that to date it has experienced not a single incident of unauthorized enrollment or switching between CSPs in its ongoing program in Virginia in which more than 20,000 customers participate.[51] It reported that its tariff includes a penalty of $30 if a CSP is unable to produce a customer consent form in the event of a dispute regarding enrollment. Washington

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[49]Virginia Power Rebuttal Comments at 5.

[50]Retail Competition: The Utility Experience in Four States at 21 (Edison Electric Institute, 1999).

[51]Washington Gas Rebuttal Comments at 4.

Gas asserts that Staff's concern about unauthorized enrollments or switching is unfounded and its burdensome proposal to prevent abuses is unnecessary.

Roanoke also expressed strong support for the Task Force rule.

Columbia Gas added that its pilot program does not require customers to notify Columbia Gas of their choice of marketers. Customers are enrolled by marketers utilizing a secured Internet site. Customers can only be enrolled by account number, and marketers can only obtain a customer's account number directly from the customer. Further, marketers must be able to provide proper verification upon request for every customer enrolled. Columbia Gas asserts that its arrangement has proven to be effective and convenient for both customers and marketers.[52]

CES argues the success of any program is impacted by the extent to which enrollment is consumer friendly. The more effort required, the less likely the consumer will select an alternative energy provider. It observes that Staff's proposal makes enrollment more difficult, causes a serious barrier to enrollment, and threatens the viability of programs in Virginia. CES asserts that equally effective consumer safeguards can be provided through: (1) hard copy authorization of enrollment, (2) audio tape telephonic enrollment or (3) Internet enrollment with appropriate consumer prompts.

Roanoke, WGES, and Enron also recommend the Commission reject Staff's modifications to the enrollment rule.

I support the Task Force rule. Both Washington Gas and Columbia Gas represented that they have experienced no such problems in their pilots. To the extent we can anticipate slamming might occur, Staff's proposal would certainly offer increased control over unauthorized switching and slamming, but other measures suggested by several parties could offer effective and appropriate protections. I must agree that Staff's alternative enrollment requirements would impose unnecessary administrative and costly burdens on LDCs and CSPs. Further, including the LDC as the "middle man" could mislead customers into perceiving the LDC as the CSP's agent, discourage customer participation, and discourage use of various direct enrollment mediums such as electronic data exchanges. Therefore, I adopt the Task Force rule:

10.A.5. A competitive service provider shall enroll a customer only when properly authorized by that customer and such authorization is appropriately verified.

Task Force Proposed Interim Rule 10.A.6.

A competitive service provider shall adequately safeguard customer information, including payment history, unless disclosure is otherwise authorized by the customer or unless the information to be disclosed is already in the public domain.

[52]Columbia Gas Comments at 8.

This rule addresses consumer privacy. The Task Force rule attempted to balance providing information that would foster a workable competitive market with protecting consumer privacy. Indeed energy customers have enjoyed a significant level of privacy. Apparently, most LDCs do not disclose customer specific information including billing, payment, or usage history.[53] Thus its proposed rule provides customer security but enables CSPs to use customer information if authorized. The Task Force rule provides CSPs the ability to use reasonable means to obtain customer authorization to disclose customer information.

Staff believes customers should continue to enjoy the privacy they have had historically, but Staff also recognizes that the marketing function in a restructured environment will operate more effectively if information about customers' payment histories is available. Staff recommends modification of this rule as follows:

> *A competitive service provider shall provide each customer with the opportunity to restrict the disclosure of customer specific information by the competitive service provider. However, this rule does not restrict the disclosure of credit and payment information as currently permitted by applicable federal and state statutes.*

WGES and Enron do not object to the changes offered by Staff. CES notes that Staff's proposal does not include a "public domain" exception. No other party offered comments on this rule.

The Task Force rule, however, appears adequate. I find no reason to adopt Staff's language over the Task Force rule. Both properly restrict disclosure of customer information. Hence, I recommend no change to the Task Force rule. This rule should read as follows:

10.A.6. A competitive service provider shall adequately safeguard customer information, including payment history, unless disclosure is otherwise authorized by the customer or unless the information to be disclosed is already in the public domain.

Task Force Proposed Interim Rule 10.A.7.

> ***A competitive service provider may terminate a contract with a customer for non-payment of competitive services with appropriate notification to the customer and to the local distribution company.***

Although the contract for service is between the CSP and the customer, the Task Force recognized that termination of the contract affects the LDC. This rule therefore provides that notice of termination should be made to the customer and the LDC. The rule is intended to remind customers that if they do not pay for service it can be terminated and to protect system integrity since the LDC will serve as the default supplier.

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[53] Ex. TF-1, at 14.

The Consumer Counsel notes that this rule is silent as to what constitutes "appropriate" notification to the customer and the LDC prior to cancellation of a contract by a CSP. He suggests modifying the rule to incorporate an expressed recognition that the Commission must determine what constitutes "appropriate" notice. He recommends that the phrase "as approved by the Commission" be inserted after "appropriate notification" in the rule.

The VRMA also expressed concern with the definition of "appropriate." It offered the following alternative language:

> *A competitive service provider may terminate a contract with a customer for nonpayment of competitive services with appropriate notification to the customer as defined under the terms of the individual contract and synchronized with appropriate notification to the local distribution company.*

Staff recommends that a CSP provide ten days' notice prior to termination so that customers have an opportunity to take corrective action. Staff also recommends that service termination coincide with a meter reading. Staff offered the following alternative language:

> *A competitive service provider may terminate a contract with a customer for non-payment of bills with a minimum of ten days' prior notification to the customer and to the local distribution company. Termination shall coincide with a customer's next actual meter reading following such notification.*

AEP-VA counters that the standard ten days' notice fails to recognize the differences between customer classes, and further unnecessarily infringes upon the rights of both customers and CSPs to negotiate contracts that fit their needs. If any change to this rule is made, AEP-VA asserts the Commission should adopt the change proposed by VRMA.

WGES and Enron also accept the changes proposed by the VRMA to clarify the termination of a contract between a CSP and a customer initiated by the CSP must be in accordance with the terms of the agreement and coordinated with the LDC.

They argue, however, that Staff's new rule is unnecessary. They assert that notice requirements for termination should be a matter of contract. Moreover, any requirement that termination coincide with the actual meter reading dates should be governed by an LDC tariff or operating procedure.

Allegheny expressed concern that notice may not be enough to protect the integrity of an LDC's system when a customer is dropped by a CSP for failure to pay since the LDC had ceased to include the customer as part of its planning when the customer chose to buy energy from the CSP.

Allegheny requests that the Commission consider requiring a minimum contract term, such as one year, upon returning for default service as well as requiring sufficient notice.[54]

I support the VRMA language and find that it should be adopted. Notice provisions can be clearly defined in service contracts, and may vary between different classes of customers. I find that flexibility is preferable to Staff's fixed ten-day period. The VRMA proposal also recognizes that termination must be synchronized with the LDC, but again, provides flexibility for the LDC and CSP to coordinate the effective date. I recommend adoption of the following rule:

10.A.7. A competitive service provider may terminate a contract with a customer for non-payment of competitive services with appropriate notification to the customer <u>as defined under the terms of the individual contract and synchronized with appropriate notification</u> ~~and~~ to the local distribution company.

<u>Proposed Additional Rules</u>

<u>Staff Proposed Interim Rule 10.A.8.</u>

Staff also proposed several additional rules to address the relationship between the CSP and the customer. First:

> *A competitive service provider shall notify a customer and explain any changes in the terms and conditions of the service contract between the competitive service provider and the customer. Such written notification shall be made at least ten days prior to the effective date of any such changes.*

Staff proposed this rule to permit customers an opportunity to review CSP changes in the terms of a service contract with the customer. The Virginia Cooperatives argue that in a competitive market the terms of service between the provider and the customer will be controlled by agreement. Generally, neither party is allowed to unilaterally alter the terms of the agreement.

Virginia Power and AEP-VA also assert that Staff's addition is unnecessary because any changes to service agreements between the CSP and a customer will be governed by contract law. WGES and Enron agree, and assert that they would not, and could not, effect any material change to contract terms without notice and agreement of the customer.[55]

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[54] Allegheny Comments at 5.

[55] WGES and Enron Joint Rebuttal Comments at 5.

I agree. The rule is not necessary. Unlike a regulated tariff that can be changed without customer agreement, a service agreement between a CSP and a customer for a non-regulated commodity cannot be altered except in accordance with its contract terms or subsequent agreement of both parties. Such a rule would only serve to imply the CSPs have a unilateral right to change contract terms. It should not be adopted.

Staff Proposed Interim Rule 10.A.9.

> *A competitive service provider requiring a deposit from a customer shall limit the amount of the deposit to no more than the equivalent of a customer's estimated liability for two months' purchases of energy services from the competitive service provider by that customer.*

Staff proposed this rule in response to the new law.[56] WGES and Enron did not object to Staff's proposed new rule as it is required by the new law. No other party commented on this rule. Virginia Code § 56-592 F requires the Commission to "establish reasonable limits on customer security deposits required by public service companies, suppliers, aggregators or any other persons providing competitive services pursuant to this chapter." The deposit recommended by Staff is the same level LDCs may collect. Therefore, it is not an arbitrary deposit requirement. I find it is reasonable to add Staff's proposed rule. The following Rule 10.A.8. should be adopted:

10.A.8. A competitive service provider requiring a deposit from a customer shall limit the amount of the deposit to no more than the equivalent of a customer's estimated liability for two months' purchases of energy services from the competitive service provider by that customer.

Staff Proposed Interim Rule 10.A.10.

> *A competitive service provider shall include a statement in its advertising and customer solicitation materials that the services being offered for sale by the competitive service provider are not price regulated by the Virginia State Corporation Commission.*

Staff recommends this rule to assure that customers understand that the CSP offers are unregulated and may be provided at non-uniform prices, terms and conditions. CES opposes a required disclosure statement concerning the nonregulated nature of the commodity price. CES asserts that it may imply to consumers that the quality and reliability are inferior if they are not regulated. Such an impression would be detrimental to the success of the programs. AEP-VA also is concerned that disclosure that CSP services "are not price regulated" will only make customers

[56] Virginia Code § 56-592 F.

uncertain about the quality of service. It argues that education not this rule will provide the best consumer protection.

WGES and Enron, however, do not object to Staff's additional rule. They already include such disclosures in many of their solicitations.

I agree that it is important for customers to fully understand the nature and consequences of different services, but I do not find a need exists for the suggested disclosure. I agree that consumer education is the appropriate means for informing consumers about differences between regulated and unregulated services, not proscriptive rules that may imply differences in quality. Therefore, Staff's proposed rule should not be adopted.

Staff Proposed Interim Rule 10.A.11.

> *A competitive service provider shall retain customer accounting and complaint records for at least three years.*

This new rule would require a CSP to retain customer accounting and complaint records for at least three years. WGES and Enron assert that their internal records are not generally available for a Staff analysis and therefore record retention requirements should not be included in the rules. AEP-VA added that a rule that requires CSPs to retain customer accounting and complaint records suggests a level of oversight of unregulated entities that will likely dissuade participation. All three companies argue Staff's new rule is unnecessary.

At this time, the Commission must carefully step away from regulation and allow the competitive market to work. We should not attempt to regulate the new entrants. If the Commission needs information to address customer complaints, discovery tools will be available. However, this rule is not necessary, and I do not adopt it.

AOBA Proposed Interim Rule on Contract Renewals

Mr. Oliver, on behalf of AOBA, recommends the rules address contract renewal provisions. He described a solicitation recently distributed by a CSP providing gas in Virginia which required the customer to inform the supplier at least 30 days prior to the end of the customer's contract period if the customer did not wish to renew the contract. If notice was not provided, the contract would automatically renew for another 12 months. Yet, Mr. Oliver noted that the supplier did not intend to provide pricing information for the next contract period until 45 days prior to the end of the contract period resulting in a brief 15-day period for the customer to investigate and compare alternative service provider offerings. He recommends that the Commission require all CSPs to allow the customer a minimum of 30 days from the time pricing for each subsequent contract period is provided for the customer to make a service renewal decision. Further, he recommends that, at least for the duration of the pilot programs, the Commission should not allow automatic service contract renewals provisions.

Contract renewals need not be addressed in pilot programs. By nature, pilots are of limited duration. However, Mr. Oliver raises an issue which should be closely watched. If CSPs provide unfair renewal provisions, as appeared to be the case in the example cited by Mr. Oliver, provisions as suggested could be included in the rules governing long-term electric restructuring.

B. Proposed interim rules applicable to relationships with local distribution companies and transmission providers

Task Force Proposed Interim Rule 10.B.1.

> ***A competitive service provider shall submit to the local distribution company the appropriate name of the entity, business and mailing addresses, and the names, telephone numbers and e-mail addresses of appropriate contact persons.***

The Task Force proposes this rule to recognize that effective communication between the CSP and LDC are necessary to maintain system reliability. Staff proposed a modified rule:

> *A competitive service provider shall submit to the local distribution company the trade name of the entity and its business and mailing addresses, together with the names, telephone numbers and e-mail addresses of appropriate contact persons, including a 24-hour emergency contact telephone number and emergency contact person(s).*

Staff's modification would add a requirement for a CSP to provide a 24-hour emergency contact person and telephone number to the LDC. WGES and Enron noted that this issue was discussed extensively at the Task Force meeting and determined not to be necessary. They observe that no LDC has proposed the requirement.[57] Staff had a different impression, noting that this rule did not generate much discussion.

Staff's addition should not be unduly burdensome, and may allow more efficient response to an emergency if a 24-hour number is available to the LDC. I find the addition of a 24-hour emergency telephone number is reasonable. I therefore recommend the Commission adopt:

10.B.1. A competitive service provider shall submit to the local distribution company the appropriate name of the entity, business and mailing addresses, and the names, telephone numbers and e-mail addresses of appropriate contact persons, including a 24-hour emergency contact telephone number and emergency contact person(s).

[57] WGES and Enron Rebuttal Comments at 6.

Task Force Proposed Interim Rule 10.B.2.

> ***A competitive service provider shall furnish the local distribution company proof of appropriate licensure from the State Corporation Commission.***

Staff made no change. However, AEP-VA contends that the rule should also require the CSP to provide proof of licensure to transmission providers since such a provider must verify arrangements for transmission service and responsibility for emergency service costs and energy imbalances. The inclusion of transmission providers in this rule would also be consistent with their inclusion elsewhere in this section. I find such an addition is reasonable. Therefore the Task Force rule should be modified as follows:

> **10.B.2. A competitive service provider shall furnish the local distribution company and transmission provider proof of appropriate licensure from the State Corporation Commission.**

Task Force Proposed Interim Rule 10.B.3.

> ***A competitive service provider shall adhere to all requirements of the local distribution company's and transmission provider's schedules, terms and conditions of service as approved by the State Corporation Commission and/or FERC as applicable.***

Staff made no change. No party commented or objected to this rule. It should be adopted as recommended.

Task Force Proposed Interim Rule 10.B.4.

> ***An energy service provider shall procure sufficient electric generation and transmission service to serve the requirements of its firm customers. In the event of a failure to fulfill such obligations, the energy service provider shall be responsible for penalties as prescribed by the local distribution company.***

This rule was also offered by the Task Force to protect the quality of service expected by consumers. It requires CSPs to contract or provide for service with sufficient backup. Staff proposed to remove the last sentence of the proposed rule arguing that it was not necessary, and also added a reference to natural gas. Staff recommended the following:

> *An energy service provider shall procure sufficient transmission service and electric generation and/or natural gas supply to serve the requirements of its firm customers.*

AEP-VA supports the rule as part of an overall package, however, notes that the subject of what constitutes "sufficient" generation and transmission service to serve the requirements of a firm customer may become an issue in its own pilot program proceeding. AEP-VA expressed concern

that CSPs may choose to pay the prescribed penalties in lieu of providing firm service, and thus the determination of the proper penalty may necessitate conclusions about what constitutes sufficient generation and transmission service under this rule.[58]

AEP-VA objects to Staff's proposal to remove the second sentence of the Task Force proposed rule which provides that an energy service provider ("ESP") will be responsible for penalties prescribed by the LDC if it fails to procure sufficient services to meet the requirements of its firm customers. AEP-VA asserts that the sentence is necessary not only to put ESPs on notice about possible penalties but also to ensure that an LDC will be able to collect such penalties as part of a pilot.

Allegheny recommends amending the rule to read at the end ". . .prescribed by the local distribution company, Control Area Operator, or Independent System Operator or Regional Transmission Entity, as applicable, and as contained in a tariff approved or accepted by appropriate authority."[59] Allegheny asserts that in the future any of those entities may be the entity involved in the transmission and delivery of generation to the end user.

Roanoke Gas also stressed the importance of retaining this rule, and specifically requiring an ESP to procure sufficient electric generation and transmission service to serve the requirements of firm customers. Roanoke notes that the ESPs must continue to provide the quality of firm service to which customers are accustomed. Moreover, Roanoke Gas argues that if CSPs fail to fulfill their responsibilities, the LDC will be the supplier of last resort and should be compensated for that service. It asserts that if the LDC is responsible for back-up service, it should have a means to recover the cost incurred in providing the service including the cost of pipeline capacity and commodity reservation cost, as well as the cost of the commodity.

VNG recommends the addition of "or sufficient natural gas delivery capability" to the rule.[60] VNG notes that omission of any reference to natural gas was inadvertent, but from a supply reliability perspective there should be no distinction between gas and electricity. VNG also supports the prescription of penalties in the event of failure on the part of the CSP to provide sufficient supplies. It advocates the establishment of a structure for penalties to send a clear price signal and also to provide a means of compensation should a supply failure occur. VNG remains concerned that the rules should recognize the LDC's continuing obligation to provide uninterrupted energy to high priority firm customers.

Columbia Gas, like VNG, asserts that the rule should be clarified to make it clear that it is intended to encompass natural gas transmission service. Columbia Gas also objects to Staff's proposal to eliminate the last sentence in the proposed rule which provides that CSPs shall be

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[58]AEP-VA Comments at 8.

[59]Allegheny Comments at 7.

[60]VNG Comments at 2.

responsible for penalties proscribed by the LDC. Columbia Gas notes that it is important for the Commission specifically to recognize the LDC right, yet allow the LDC to determine the appropriate vehicle for assessing such a penalty (i.e., tariff or agreement).

Staff comments support the right of an LDC to impose penalties. Staff merely believes the reference in these rules to that right is not necessary. Based on the responses to Staff's recommendation, however, the right of LDCs to impose penalties to protect the reliability of service should be clearly stated and not left to uncertainty. No specific proposal for a penalty structure was made, therefore, for pilot programs the LDCs should be allowed to request penalties in individual pilot programs based on system specific costs. The Task Force rule as amended to include natural gas should be adopted. This rule would then read as follows:

10.B.4. An energy service provider shall procure sufficient electric generation and transmission service or sufficient natural gas delivery capability to serve the requirements of its firm customers. In the event of a failure to fulfill such obligations, the energy service provider shall be responsible for penalties as prescribed by the local distribution company.

Task Force Proposed Interim Rule 10.B.5.

A competitive service provider shall comply with all initial and continuing requirements of the State Corporation Commission's licensure process and the local distribution company's and transmission provider's registration processes.

Staff recommends no change. Allegheny recommends that the LDC's registration process be set forth in a tariff approved by the Commission. This rule should be adopted as proposed. LDCs certainly can set forth those processes in their tariffs. However, it is unnecessary to require inclusion in these rules for pilots. Thus I recommend the following rule be adopted:

10.B.5. A competitive service provider shall comply with all initial and continuing requirements of the State Corporation Commission's licensure process and the local distribution company's and transmission provider's registration processes.

Task Force Proposed Interim Rule 10.B.6.

A competitive service provider shall adhere to standards developed for exchanging data and information in an electronic medium upon implementation of such standards.

Staff made no changes. No other party objected to this rule. It should be adopted as proposed.

10.B.6. A competitive service provider shall adhere to standards developed for exchanging data and information in an electronic medium upon implementation of such standards.

Task Force Proposed Interim Rule 10.C.

> ***Any request for a waiver of any of the provisions in subsections A. or B. above shall be considered by the State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the State Corporation Commission may impose.***

Staff suggests only editorial changes in the references to the Commission. Staff suggested the same changes in later provisions addressing waivers. No party objected. Here Staff proposes to substitute and I find reasonable:

> **10.C. Any request for a waiver of any of the provisions in subsections A. or B. above shall be considered by the Virginia State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the ~~State Corporation~~ Commission may impose.**

IV. PROPOSED INTERIM RULES GOVERNING LOCAL DISTRIBUTION COMPANIES

This set of rules (20 VAC 5-311-20.) governs the relationships between the local distribution company and the competitive service provider, particularly its ACSPs, and between the local distribution company and its customers.

A. Proposed interim rules applicable to relationships with competitive service providers

Task Force Proposed Interim Rule 20.A.1.

> ***A local distribution company shall not give an affiliated competitive service provider undue preference over a non-affiliated competitive service provider.***

The phrase "undue preference" in this rule engendered much debate. The Consumer Counsel recommends the word "undue" be deleted from this rule and the next, Rule 20.A.2. He notes that as written, the rules allow an LDC to give preferential treatment to an ACSP if such preference is not "undue." He urges the Commission to guard against any discriminatory, preferential, or inequitable conduct by an LDC toward its ACSP. He argues that as drafted, the Task Force rule would require other parties to institute an action at the Commission to prove and enjoin any identified "undue" preferences. In his opinion the rule results in an inappropriate burden on other parties.[61] Ms. Fox also asserts that an LDC should be precluded from giving an ACSP any preference, not just "undue" preference.[62]

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[61]Consumer Counsel Comments at 7.

[62]Tr. 24.

AEP-VA, however, reported that after much debate, the Task Force included the word "undue" before "preference" in this rule. AEP-VA supports its inclusion to allow reasonable practices and notes that if "undue" is struck from the rules other modifications may be necessary to make clear that specific practices are acceptable and allowable.[63]

Virginia Power asserts that there is ample precedence indicating "undue" is an appropriate term to use in a context intended to minimize frivolous claims against the LDC. It argues that there may be instances of daily operation or emergencies where inadvertent preferences may take place.[64]

Allegheny also opposes striking "undue." It agrees that there are some reasonable practices that could constitute preferences between affiliates.

Washington Gas and Roanoke Gas also support the proposed Task Force rule. They were concerned that application of a strict literal interpretation without qualification of "preferences" could be used against an LDC.

The VPGA expressed concern with the phrase "undue preference" because it argues the phrase is undefined. It recommends that LDCs be required to follow competitive solicitation procurement practices for goods or services from an ACSP above $25,000.

Staff retained the phrase "undue," but recommended reordering the rules in this section to list specific prohibitions first. Staff also proposes this rule be modified to add the words "any other" before "undue preference." AEP-VA interprets the effect of that change to prohibit any preference not listed or identified by Staff.

VRMA discussed extensively the nature and extent of federal regulation under the Federal Power Act in its comments. It urges the Commission to require incumbent electric utilities to apply FERC's standards of conduct to all retail merchant functions, and it offered changes to the Task Force Rules 20.A.1 through 4 to incorporate the federal standards.[65]

AEP-VA also opposes the VRMA's proposed changes to Rules 20.A.1-A.4 intended to address a "potential regulatory gap." AEP-VA asserts that there is no need for the changes especially in rules applicable to pilots to rectify a problem that may not even exist. If the problem arises, the Commission can address it then.

Although I have no objection to Staff's order of presenting the rules in this section, I am reticent to change the Task Force rules without compelling reason. The Task Force order of

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[63]AEP-VA Comments at 8.

[64]Virginia Power Reply Comments at 13.

[65]VRMA Comments at 13-14.

presenting the rules is understandable and reasonable, and should be retained. The Task Force starts with a general prohibition and then gives some examples. That approach recognizes that it would be impossible to create a complete list of reasonable practices that may also be preferences.

I also support retaining the phrase "undue." The Commission has long addressed this clarifying adjective with regard to rate discrimination. Moreover, it would be difficult to try to list operating or inadvertent circumstances when a preference should be allowed or excused. I also reject the changes urged by VPGA. Its proposal to focus the rule on procurement practices constrains the focus of the rule. Preference can be shown in many ways. The Task Force rule broadly prohibits all undue preference and is preferable. Finally, it is not necessary to incorporate FERC standards of conduct as suggested by VRMA. I adopt the Task Force rule as proposed. It should therefore read as follows:

20.A.1. A local distribution company shall not give an affiliated competitive service provider undue preference over a non-affiliated competitive service provider.

Task Force Proposed Interim Rule 20.A.2.

> ***A local distribution company shall not give undue preference to an affiliated competitive service provider over the interests of any other competitive service provider related to the provision of electric transmission, distribution, generation, or ancillary services, or natural gas supply or capacity. However, this provision is limited to activities that are beyond the jurisdiction of the Federal Energy Regulatory Commission.***

Similar concerns were raised, but have already been addressed, with prohibiting only "undue" preference in this rule. In addition, the Virginia Cooperatives assert that they cannot make precisely the same terms of service and rates available to every non-member CSP. They note that the periodic refund of capital credit to a member ACSP could be regarded as an offer of preferential treatment. Further, they argue that if a cooperative were required to make capacity generally available to non-members at member rates, its non-member revenues would increase and could adversely impact its tax exempt status.[66] They assert therefore that certain preferences are due to cooperative members. The Virginia Cooperatives assert that preservation of the word "undue" is sufficient to limit improper preferences. Consistent with the previous rule, this rule should also prohibit "undue" preferences.

Staff also recommends eliminating the last sentence of this rule that limits application to activities beyond the scope of the FERC jurisdiction. (Staff also reorders this rule as its Rule 20.A.7.). AEP-VA, however, suggests that this rule should be viewed as a whole and should either be adopted in its entirety or deleted. Columbia Gas asserts that the provision that Staff deletes is intended to avoid duplicative and potentially inconsistent federal and state requirements. It is designed to enhance administration of this rule by expressly recognizing some affiliate matters are

[66]Virginia Cooperatives Comments at 15.

adequately addressed by existing federal law or regulation. WGES and Enron also urge the Commission to closely evaluate the potential jurisdictional conflicts of the proposed rules with federal regulations.

VRMA was also concerned with the balance between federal and state regulation, and particularly a potential regulatory gap. It recommended changes to this rule to extend state regulation in this area to activities that "may also be subject to the jurisdiction of the Federal Energy Regulatory Commission."[67]

VPGA suggests that the rule be redrafted to require an LDC to:

> *process in the same timely manner all similar requests related to the provision of electric transmission, distribution, generation and ancillary services, or natural gas supply or capacity, whether requested on behalf of an affiliated or a nonaffiliated competitive service provider.*

Further, it suggests that a new rule be added as follows:

> *Unless prohibited by law, any discounts, rebates, promotional considerations or guarantees that a local distribution company offers to an affiliated competitive service provider related to the provision of electric transmission, distribution, generation or ancillary services, or natural gas supply or capacity, shall also be offered to all non-affiliated competitive service providers.*[68]

The Task Force rule as proposed should be adopted, and the modifications offered by Staff, VRMA and VPGA should be rejected. The rule as drafted adequately addresses any gaps by making it clear that the Commission prohibits undue preferences related to electric transmission, distribution, generation, or ancillary services, or natural gas supply or capacity beyond federal regulation. I agree that it is reasonable to retain the acknowledgement that federal regulation will preempt Commission jurisdiction relative to some of the services addressed in this rule. Such an acknowledgement should ease concern with potential federal-state conflicts. I also find VPGA changes to this rule are not necessary. The preferences that VPGA attempts to preclude by its proposed language are adequately addressed by the more general prohibitions. This rule should be adopted as follows:

20.A.2. A local distribution company shall not give undue preference to an affiliated competitive service provider over the interests of any other competitive service provider related to the provision of electric transmission, distribution, generation, or ancillary services, or natural gas supply or capacity. However, this provision is

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[67]VRMA Comments at 13.

[68]VPGA Comments at 2.

limited to activities that are beyond the jurisdiction of the Federal Energy Regulatory Commission.

Task Force Proposed Interim Rule 20.A.3.

To the extent the local distribution company provides any competitive service provider information related to the transmission, distribution or provision of electricity and/or natural gas, the local distribution company shall make such information contemporaneously available to all other competitive service providers upon request. The local distribution company may make such information available by posting it on an electronic bulletin board. Nothing in this paragraph shall require the local distribution company to disseminate to all competitive service providers information requested and deemed competitively sensitive by a competitive service provider and supplied by the local distribution company. This paragraph shall not apply to daily operational data provided by the local distribution company to any competitive service provider in the ordinary course of conducting business.

The intent of this rule is to prohibit ACSPs preferential access to information that would provide it a marketing advantage over non-affiliated companies.

VPGA argues the rule needs to be clarified and raised several concerns. First, it asserts the rule does not say to whom the LDC provides information and recommends that language be added to make it clear that information should be provided to all CSPs to the extent the information is provided to an ACSP. Second, VPGA notes that there is no explanation of the type of information addressed by the rule. It is understood to mean customer information, sales leads, procurement advice, but VPGA asserts the rule should be more specific. Third, if the information is to be made available upon request, how are non-ACSPs to know the information is available? Since it is important that the information is contemporaneously available to non-affiliated providers VPGA suggests that a procedure be established for a non-affiliated provider to provide a one-time notice to the LDC and then be placed on a distribution list. Fourth, VPGA expressed concern with the type of information meant to be covered by the words "competitively sensitive." Moreover, VPGA suggests this provision is ripe for abuse since the rule provides that the LDC simply has to "deem" the information "competitively sensitive" to ensure that it is not disseminated. VPGA urges some oversight be required. Finally, VGPA asserts that the phrase "daily operational data" should be defined. VPGA provides recommended revisions for this rule to address its concerns:

To the extent the local distribution company provides affiliated competitive service providers any competitive service provider information, such as customer usage, billing and other information, sales leads and procurement advice, related to the transmission, distribution or provision of electricity and/or natural gas, such information shall also be made contemporaneously available to all other competitive service providers who have notified the local distribution company that they wish to receive such information. The local distribution company shall provide shall information either electronically or by mail, at the competitive service provider's option. Nothing in this paragraph shall require the local distributor

company to disseminate confidential business information it has obtained from one competitive service provider to other competitive service providers. This paragraph shall not apply to daily operational data provided by the local distribution company to any competitive service provider in the ordinary course of conducting business. [The Commission will need to define "confidential business information" and "daily operational data" and establish procedures to review the legitimacy of any claim that certain information falls within these definitions.][69]

AEP-VA supports the Task Force proposed rule, but noted that it was sympathetic to VPGA's concern about the clarity of the rule. If modifications are to be adopted, however, AEP-VA favors Staff's rewrite with one modification over VPGA's because the Staff's change more closely follows the intent of the Task Force proposal. AEP-VA suggested the phrase "non-competitively sensitive" be inserted in Staff's proposed rule. Staff agreed.[70]

Staff thus attempts to clarify this rule (its Rule 20.A.1.):

No local distribution company shall withhold from any competitive service provider non-competitively sensitive information that the local distribution company has provided to any other competitive service provider. The local distribution company may make such non-competitively sensitive information available by posting it on an electronic bulletin board. This paragraph shall not apply to competitive service provider specific information used in the ordinary course of conducting business.

Yet, the Virginia Cooperatives assert that Staff creates unintended results. Under the Staff rule, the LDC must provide to all CSPs any information it has provided to another CSP. They argue the wording is too broad and calls for disclosure of information well outside that required for the LDC-CSP relationship. They argue the Task Force proposal provides appropriate limitations and should be adopted.

Delmarva also takes exception to Staff's proposed rule. It argues that requirements governing the exchange of information between an LDC and any CSP should be limited to information related to "transmission, distribution or provision of electricity and/or natural gas" as reflected in the Task Force rule.

WGES and Enron agree and assert that Staff's proposal would substantially alter and expand the intent of the Task Force rule. They urge the Commission to take special care to assure that any changes made to the proposed rules do not require or otherwise imply that an LDC must disclose to all CSPs customer specific information that has been given to one CSP based on written authorization by the customer.

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[69]VPGA Comments at 4.

[70]Tr. 47.

I support the Task Force rule. It appropriately limits disclosure to information related to "transmission, distribution, or provision of electricity and/or natural gas." A more broadly worded rule risks unnecessary disclosure. The Task Force rule requires information to be contemporaneously made available to all CSPs. It also reasonably excludes daily operational data. I find it adequately addresses many of VPGA's concerns. CSPs also can generally request relevant information as suggested by VPGA without modification to the rule. Thus, the recommendations of Staff and VPGA should be rejected, and the Task Force rule adopted as follows:

20.A.3. To the extent the local distribution company provides any competitive service provider information related to the transmission, distribution or provision of electricity and/or natural gas, the local distribution company shall make such information contemporaneously available to all other competitive service providers upon request. The local distribution company may make such information available by posting it on an electronic bulletin board. Nothing in this paragraph shall require the local distribution company to disseminate to all competitive service providers information requested and deemed competitively sensitive by a competitive service provider and supplied by the local distribution company. This paragraph shall not apply to daily operational data provided by the local distribution company to any competitive service provider in the ordinary course of conducting business.

Task Force Proposed Interim Rule 20.A.4.

Employees of a local distribution company who have responsibility for operations or reliability functions of the distribution system shall operate independently from an affiliated competitive service provider, and their offices shall be separated from the offices of the affiliated competitive service providers to the maximum extent practicable.

This rule reflects the importance of assuring that at least some of the employees of an LDC and its ACSP operate separately in certain functions. It also requires adequate separation of the offices of those employees. However, many Task Force members agreed that common office buildings could be shared with safeguards. Yet Staff proposed an alternative rule requiring complete separation:

Employees and/or agents of a local distribution company shall operate independently from employees and/or agents of any affiliated competitive service provider(s), and their offices shall be separated from the offices of the affiliated competitive service provider(s).[71]

AOBA also recommends that employees, officers and directors of an LDC be prohibited from serving as officers, directors or managers of an ACSP and that employees of an LDC be

[71]Staff reorders this rule as its Rule 20.A.9.

barred from participating in hiring or training employees of an affiliate. Finally, AOBA recommends that no LDC employee receive compensation which is directly or indirectly influenced by the performance of an ACSP. Mr. Oliver for AOBA, testified that the proposed rules governing LDCs do not provide adequate protection for customers or the competitive market. He asserts that they provide inadequate segregation of utility and non-utility functions due to the allowance of shared employees, and lack adequate safeguards: (1) to ensure that utility employees are not provided economic incentives to favor affiliated providers, (2) to ban employees, officers and directors of a utility from also serving as officers, directors or managers of an ACSP, and (3) to address interactions of LDCs with parent or holding company personnel who have responsibility for, or a financial interest in, the ACSP performance.

The Consumer Counsel is not as absolute in his recommendation, but urges the Commission to also require employees involved in planning and operation of the transmission system to be functionally independent from the ACSP. He recommends the addition of the words "transmission, or generation" after the word "distribution" in the rule.

Virginia Power takes exception to the proposed modification to this rule offered by Staff and AOBA. Virginia Power first objects to the expansion of the rule to cover "agents' of the LDC, noting that it was not discussed during the Task Force deliberations. Virginia Power also contends that "complete separation" of employees will result in multiple employees performing similar tasks, and thus reduce operating efficiencies and potentially increase cost to consumers. Virginia Power argues that such a requirement would impose barriers to entry for ACSPs, and thus would inhibit the development of a competitive market during the pilots. Virginia Power does not support a rule that prohibits sharing non-operational employees such as office support personnel involved in information technology, human resources, payroll, or janitorial services.[72] Virginia Power argued that many of Staff's changes in this section of the rules would favor without justification market competitors who are not affiliated to LDCs rather than protecting competition by preventing abusive conduct.

Virginia Power recommends that the phrase "to the maximum extent practical" be deleted from the Task Force rule, but emphasized that separation envisioned by the Task Force applied to those employees responsible for the day-to-day functioning of the delivery system and those actively engaged in the marketing or sale of energy. Virginia Power also emphasized that the rule should not, and the Task Force agreed that the rule was not intended to, require separate buildings.

AEP-VA also objects to a rule that would require complete separation. AEP-VA argues that complete separation is not the only means to ensure no cross-subsidies or preferential treatment result from affiliate relationships. AEP-VA favors retention of the words "to the maximum extent practicable" to provide at least some degree of flexibility to entities such as the Virginia Cooperatives.

[72]Virginia Power Rebuttal Comments at 10.

Allegheny also asserts that complete separation is overly restrictive, noting that employees such as lawyers and accountants can be shared within a corporate structure with careful allocation of costs. Allegheny agrees that complete separation would raise costs to consumers and cause a loss of economic efficiency. Allegheny also objects to AOBA's proposal, and contends that it would ban an LDC employee from participating in a company's 401K program and ban matching employee contributions with stock.

Delmarva also filed comments taking exception to the proposed changes. Delmarva contends that the broad prohibition is not only unnecessary but could significantly diminish the legitimate economies of scope and scale that would otherwise benefit LDC customers. Proposals for complete separation go well beyond the new statutory requirement of Virginia Code § 56-590 C which would prohibit "functionally separate units from engaging in anticompetitive behavior or self-dealing" and prohibit "affiliated entities from engaging in discriminatory behavior towards non-affiliated units." Delmarva notes that the only exposure in the electric area lies in the control of essential facilities of the regulated "wires" business which is addressed by the Task Force proposal.

Washington Gas supports the proposed Task Force rule and opposes the recommendations of Staff and AOBA. Washington Gas notes that the proposed Task Force rule would not prevent CSPs from receiving support services from affiliated entities and properly recognizes ACSPs should not be denied the same opportunity to obtain nonoperational services from a utility affiliate. Washington Gas asserts that utility ratepayers benefit when nonoperational employees are permitted to perform services for affiliates since the allocation of costs to the ACSP reduces the utility cost of service for ratepayers. Washington Gas also argues that AOBA's recommendation to prohibit compensation influenced by the performance of an affiliate would effectively prohibit the award of stock options as compensation for executives of an LDC since the price of the stock may well be affected by the performance of the company's operating subsidiaries.[73]

Roanoke also supports the language in the Task Force rule. It agrees that the rule provides for a reasonable amount of separation for regulated and competitive services but does not place undue burdens and added expense on utilities and ultimately, the customers.

The Virginia Cooperatives echoed the arguments of the LDCs, and are opposed to having burdensome requirements regarding separation of functions applied to them during a pilot program.

Although Staff's proposal to extend the separations requirement to all employees does not affect Columbia Gas, it commented on the rule, asserting that it appeared unduly burdensome and costly without any corresponding benefit, especially in the context of a pilot program.

WGES also noted that it was not affected by Staff's proposal for a mandatory separation rule since its offices are completely separate from Washington Gas's utility operations. Enron employees are located in the same office building, but on separate floors from its regulated

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[73]Washington Gas Reply Comments at 6.

operations and it has instituted measures such as separate elevator banks to ensure separation. However, both companies assert that mandating that all employees, operating and nonoperating must be completely separate goes too far. They note that the Commission's regulation of affiliates does not bar certain shared services such as accounting, legal or other professional services, under approved service agreements. They argue that such a rule would limit competition in Virginia and impose a requirement for a multi-state CSP business structure that would be unique to Virginia.

I must disagree with Staff and AOBA. The Task Force rule adequately protects against cross-subsidies and unfair competitive advantages through the separation of operational employees without imposing unnecessary costs on the ACSP during pilot programs. Sharing nonoperational employees such as retirement account administrators or janitors clearly does not result in an unfair advantage to an ACSP. Although it may be reasonable to impose more strict separation requirements when retail access begins on a permanent and full scale basis, it is overly burdensome to impose such a requirement for pilot programs. Pilots by definition are limited in size and duration. Requiring complete separation for pilots would effectively preclude ACSP participation, would have a negative effect on competition, and preclude a limited opportunity to gather information concerning affiliate relationships in this new market. I support the Task Force rule modified as recommended by the Consumer Counsel to also require separation of employees involved in planning and operating transmission and generation:

20.A.4. Employees of a local distribution company who have responsibility for operations or reliably functions of the distribution, transmission, or generation system shall operate independently from an affiliated competitive service provider, and their offices shall be separated from the offices of the affiliated competitive service providers to the maximum extent practicable.

Task Force Proposed Interim Rule 20.A.5.

The cost of any shared employees, services or facilities between a local distribution company and an affiliated competitive service provider shall be fully and clearly allocated between the entities. Separate books of account and records shall be maintained for each such affiliate. Any local distribution company that provides competitive energy services through a division shall maintain documentation of the methodologies used to allocate any shared costs to that division and provide such documentation to the State Corporation Commission staff upon request.

This rule is intended to protect ratepayers against cross-subsidies. The Affiliates Act[74] requires specific approval of agreements between affiliated companies, but does not apply to arrangements between a utility and one of its own divisions. This rule is thus intended to provide

[74]Virginia Code §§ 56-76 et seq.

adequate segregation of costs and appropriate oversight by the Commission during a pilot without creating costly and labor intensive burdens on the LDC.

Staff proposes to substitute two rules:

> *20.A.10. Any local distribution company which has a division(s) that provides competitive energy services shall develop and file with the State Corporation Commission a cost allocation manual ("CAM") which provides a narrative describing the computation of all factors used to separate its revenues, expenses and rate base components. The local distribution company shall maintain documentation supporting the development of the cost allocation manual. Any changes to the cost allocation manual shall be filed annually with the Commission's Division of Public Utility Accounting.*
>
> *20.A.11. Any local distribution company which has a Commission-approved cost allocation manual shall file a schedule with the Commission's Division of Public Utility Accounting on an annual basis that allocates revenues, expenses and rate base between regulated Virginia jurisdictional, competitive energy services and other non-regulated operations. The local distribution company shall maintain documentation supporting the allocations.*

Virginia Power asserts that Staff's reliance on the use of Cost Allocation Manuals ("CAMs") in the telecommunications industry is misplaced since competitive service offerings in that industry are numerous and often difficult to clearly discern from regulated services. It contends that in the energy industry there will be fewer competitive service offerings and those that are offered will be more easily distinguished from the provision of regulated services.[75] Virginia Power acknowledges that it is important that utilities that elect to provide competitive services through a division be held accountable for allocating costs appropriately and thus it would endorse the concept of "building a fence" around the division. It suggests that an equitable compromise may be to extend the principles of cost assignment and allocation specified in the Affiliates Act to circumstances in which LDCs choose to offer competitive service through a division. Virginia Power thus suggests that the phrase "documentation of the methodologies used to allocate any shared costs to that division" be struck from the Task Force rule and replaced with "separate books of account and records for the division as if it were an affiliate."[76] Virginia Power emphasized, however, that new methodologies are not needed, particularly CAMs which will increase administrative oversight, not be cost-effective and will serve to decrease economies of scale and lessen the benefits of competition.

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[75]Virginia Power Rebuttal Comments at 11.

[76]Id. at 12.

AEP-VA also asserts that a CAM would only add cost without meaningful benefit, noting that the time necessary to develop CAMs would be greatly disportionate to the temporary nature of the pilots.

Allegheny agrees and notes that the Task Force discussed the issue of CAMs extensively and rejected that requirement in favor of the Task Force proposed rule. Allegheny asserts that the development and maintenance of a CAM is costly, burdensome, and unnecessary.

The Virginia Cooperatives join the LDCs in opposition to the Staff proposal to require CAMs. The Virginia Cooperatives share the frequently cited concern that the volume, detail and expense of preparing a formal CAM prior to a pilot program would be overly burdensome and resource intensive. Moreover, they argue a CAM for a pilot program is simply not necessary.

The Virginia Cooperatives also reported that on April 6, 1999, the NARUC Staff Subcommittee on Accounts issued a revised draft of NARUC guidelines on the use of CAMs and requested comments for presentation to various NARUC committees at the July 1999 meetings. The guidelines presented by Staff thus were not final statements of recommended policy, but rather only an earlier draft. The NARUC draft guidelines show that the development of CAM policy and practices is a significant undertaking. The Virginia Cooperatives concluded that the development of a formal workable CAM in the context of pilot programs is unrealistic, impractical and may even be impossible.

Roanoke also opposes Staff's proposed requirement to file CAMs as voluminous and expensive.

I find Virginia Power's compromise to be reasonable. I agree that requiring CAMs for short-lived pilots is excessive and unnecessary. With pilots only now beginning, it is uncertain whether CAMs will even be necessary in the long term for the energy industry as they are in telecommunications. If it appears that the menu of energy options is as diverse as in telecommunications, CAMs indeed may be necessary. However, whether ultimately necessary or not, the procedures in place for affiliated companies are adequate for a division engaged in providing competitive services in a pilot program. However, the LDC should provide evidence that separate books of account and records will be used as part of their application for approval of any pilots. The Task Force rule should be amended as follows:

20A.5. The cost of any shared employees, services or facilities between a local distribution company and an affiliated competitive service provider shall be fully and clearly allocated between the entities. Separate books of account and records shall be maintained for each such affiliate. Any local distribution company that provides competitive energy services through a division shall maintain ~~documentation of the methodologies used to allocate any shared costs to that division~~ separate books of account and records for the division as if it were an affiliate and provide such documentation to the State Corporation Commission ~~staff upon request~~ as part of the pilot program approval process.

Task Force Proposed Interim Rule 20.A.6.

> ***A local distribution company shall not condition the provision of any distribution services on the purchase of electricity and/or natural gas from an affiliated competitive service provider.***

Staff proposes no changes to this rule, but recommends reordering its sequence and would list it as Rule 20.A.2. The Task Force rule should be adopted as Rule 20.A.6.

Task Force Proposed Interim Rule 20.A.7.

> ***Joint advertising shall be prohibited between the local distribution company and any competitive service provider unless made available to all competitive service providers upon the same price, terms and conditions.***

Again, Staff agrees with the Task Force rule and proposes no change in the rule, but changes the sequence and recommends this as its Rule 20.A.3.

VPGA, however, suggests that joint advertising could be interpreted in different ways and recommends that the rule be revised to add "promotions and mailings" after the phrase "joint advertising." Yet, I find VPGA's recommendation may be too limiting. I agree that the Task Force rule is adequate and recommend that it be adopted.

20.A.7. Joint advertising shall be prohibited between the local distribution company and any competitive service provider unless made available to all competitive service providers upon the same price, terms and conditions.

Task Force Proposed Interim Rule 20.A.8.

> ***Neither a local distribution company nor any competitive service provider shall:***
>
> ***a. Suggest that the distribution services provided by the local distribution company are of a superior quality when electricity and/or natural gas is purchased from a particular competitive service provider; or***
>
> ***b. Suggest that the competitive energy services provided by a competitive service provider are being provided by a local distribution company rather than the specified competitive service provider.***

Staff also agrees with this rule, but recommends that it be renumbered as Rule 20.A.4.

VPGA urges the Commission to add a paragraph to this rule to ensure no suggestion is made that an advantage or preference will accrue to anyone who uses a particular CSP because of that provider's affiliation with the LDC. Specifically, they suggest adding:

> *c. Suggest that an advantage or preference will accrue to someone who uses a particular competitive service provider because of that competitive service provider's affiliation with a local distribution company.*[77]

AEP-VA counters that the VPGA additions are unnecessary. I agree. The Task Force rule is reasonable and should be adopted.

Task Force Proposed Interim Rule 20.A.9.

> ***No affiliated competitive service provider shall trade upon, promote or advertise its relationship with the local distribution company or use the name or logo employed by the local distribution company as its own, without clearly disclosing that the affiliated competitive service provider is not the same company as the local distribution company.***

The Task Force proposed this rule to assure that the customers are aware of any affiliate relationship. The rule requires an ACSP to clearly advise the public that it is not the same company as the LDC if it proposes to use the name or logo employed by the LDC as its own.

Staff recommends no change, but lists this rule as its Rule 20.A.12.

VPGA and the VCCC, however, propose a complete ban on an affiliate's use of the LDC's name, brand, trade name, logo, or trademark.

VPGA asserts that a rule restricting the use of the LDC's name is essential and urges the Commission to adopt the following more encompassing prohibition:

> *No competitive service provider shall use the name, brand or trade name, logo or trademark of its affiliated local distribution company in any marketing, promotional, advertising or sales activities; provided, however, that nothing herein shall prohibit the competitive service provider from merely identifying itself accurately, as an affiliate of the local distribution company by including the statement "an affiliate of _____." If this statement is made in writing, it shall be in type no smaller than the smallest type used elsewhere in the writing.*[78]

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[77] VPGA Comments at 5.

[78] Id. at 5, 6.

The VCCC also suggests that an ACSP not be allowed to use the utility's name or logo. Ms. Fox contends that an affiliate has an advantage due to the knowledge, resources, and name recognition of the LDC which has historically been the sole place consumers have been able to buy gas or electricity in the past. She noted that the Task Force rule attempts to address the issue by requiring a disclosure that the affiliate supplier is not the same company, but in her opinion, it does not go far enough.

Virginia Power notes that the Task Force rule is intended to be a "truth-in-advertising" statement. Virginia Power asserts that ACSPs should be free to use a version of the LDC name and logo in order to clearly indicate that the products and services come from the same "family" of companies.[79] Virginia Power also suggests that the word "provider" be used in the last line of the rule instead of "company."[80]

Delmarva suggests the rule be clarified to refer to use of the LDC's name or logo as its own "in solicitation materials."[81]

AEP-VA supports Delmarva's suggestion. AEP-VA also asserts that protection provided in the Task Force rule is more than adequate, and should not be expanded as suggested by VPGA.

Allegheny supports the Task Force rule, but requests the Commission to clarify that a disclosure on such things as clothing, caps and vehicles is not necessary and highly impractical.

Washington Gas also supports the Task Force rule. It argues that the disclaimer contained in the rule will ensure that customers understand they are entering contracts with an affiliate of the LDC, not the LDC itself. However, Washington Gas asserts that the name and the logo of the utility are shareholder assets and a company should have the discretion to use the name and logo for business purposes. Washington Gas contends that the rule proposed by the Task Force properly balances those interests.

Roanoke Gas strongly opposes any proposal that would prohibit the use of an LDC's name or logo. It also contends that clear disclosure that the CSP is not the same company as the LDC is a sufficient safeguard against inappropriate or misleading use of a name or logo.

The Task Force recognized that an affiliate relationship could also have a negative customer reaction. In any case, I do not recommend a ban on the ACSP's use of its family name or logo. For better or worse, an affiliate should have the right to use its company's name and logo. Moreover, customers have the right to be fully informed. Clear disclosure that the CSP is a different operation than the LDC should be adequate. Moreover, although I agree that a disclosure on clothing, caps

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[79]Virginia Power Comments at 6.

[80]Id. at 7.

[81]Delmarva Comments at 2.

and vehicles is impractical, it should nonetheless be clear that the employee wearing the clothing or driving the vehicle does not represent the LDC. I however find Delmarva's recommendation to limit disclosure to solicitation materials to be reasonable for pilot programs. I recommend the following rule:

20.A.9. No affiliated competitive service provider shall trade upon, promote or advertise its relationship with the local distribution company or use the name or logo employed by the local distribution company as its own <u>in solicitation materials</u>, without clearly disclosing that the affiliated competitive service provider is not the same ~~company~~ <u>provider</u> as the local distribution company.

<u>Task Force Proposed Interim Rule 20.A.10.</u>

A local distribution company shall establish and file with the State Corporation Commission dispute resolution procedures to address complaints alleging violations of these rules.

Staff recommends dispute resolution procedures be approved by the Commission to ensure that they are adequate. Staff also recommends renumbering this rule as Rule 20.A.14. Staff therefore proposes:

A local distribution company shall establish and file for Commission approval of dispute resolution procedures to address complaints alleging violations of rules in Section A.

As written, this rule requires the LDC to establish dispute resolution procedures with no means for the CSPs or the Commission to participate in the establishment of the procedures, there is no required review or approval by the Commission. VPGA urges the Commission to establish the procedures now rather than leave them to the discretion of the LDC.

No party otherwise commented on this rule or Staff's proposed change. The LDC's dispute resolution procedure could readily be filed with its application for approval of its pilot, therefore Staff's change does not appear to impose any unreasonable burdens on LDCs. Staff's alternative rule is reasonable and should be adopted. The rule should read as follows:

20.A.10. A local distribution company shall establish and file ~~with the State Corporation~~ <u>for</u> Commission <u>approval of</u> dispute resolution procedures to address complaints alleging violations of ~~these~~ rules <u>in Section A</u>.

<u>Task Force Proposed Interim Rule 20.A.11.</u>

Notwithstanding any other provision of these rules, in emergency situations, a local distribution company is authorized to take any actions that may be necessary to ensure

public safety and reliability of the distribution system. The State Corporation Commission upon a reasonable claim of inappropriate action may later investigate such actions.

This rule was proposed to recognize the LDC's responsibility to protect the safety and reliability of its distribution systems. Affected parties however should be allowed to request an investigation of inappropriate behavior. Some Task Force members although not contesting this rule, believe it was not necessary as LDCs have authority to act in case of emergencies.

No participant took issue in their comments with this rule. Roanoke Gas considered it important enough to explicitly support its inclusion because it provides the LDC with the authority to take necessary actions to ensure public safety and reliability. Roanoke stressed that under no circumstances should the final Rules eliminate or diminish that authority.[82]

To incorporate the possibility of corrective action Staff offered the following change:

Notwithstanding any other provision of these rules, in emergency situations, a local distribution company may take any actions that may be necessary to ensure public safety and reliability of the distribution system. The Virginia State Corporation Commission upon a reasonable claim of inappropriate action may investigate and take such corrective actions as may be appropriate.

I agree with the importance of this rule, and further that it should be clear that the Commission has the authority to take corrective action if appropriate following investigation. Staff's recommendation explicitly states that authority to avoid any uncertainty. The Task Force rule as modified by Staff is appropriate.

20.A.11. Notwithstanding any other provision of these rules, in emergency situations, a local distribution company ~~is authorized to~~ may take any actions that may be necessary to ensure public safety and reliability of the distribution system. The Virginia State Corporation Commission upon a reasonable claim of inappropriate action may ~~later~~ investigate and take such corrective actions as may be appropriate.

[82]Roanoke Gas Comments at 4.

Proposed Additional Rules

Staff Proposed Interim Rule 20.A.6.

Staff also proposed new rules in this section. The first new rule which Staff proposes and would number as Rule 20.A.6. provides:

> *In the event that a competitive service provider's services are permanently terminated, the local distribution company shall send notification to affected customers within five business days of being informed of such termination of services. Such notification shall describe the process for selecting a new competitive service provider and note that service will continue to be provided by the default service provider if a new competitive service provider is not selected.*

Staff asserts this rule is necessary to assure customers are notified upon permanent termination, and further notified that they will have to arrange service with another CSP or will receive default service from the LDC.

Columbia Gas argues this rule is not necessary although it agrees that it is reasonable to expect the CSP and the LDC to work together to ensure customer notification in the event of permanent termination of a CSP's services. Moreover, Columbia Gas contends that five business days may not be practical given the extent of the notice obligation, the time required to identify the CSP's customers, and the relative speed of U.S. mail.

I support Staff's intent to require the LDC to remind customers of their choices upon termination of service from a CSP. For purposes of pilot programs, however, I recommend Staff's defined notice period be stated as "a reasonable period" to allow LDCs flexibility to determine through experience the time required to properly notify customers that the CSP service has terminated and advise them of their options. As this rule would follow the rules previously discussed, the following Rule 20.B.12. should be adopted:

20.B.12. In the event that competitive service provider's services are permanently terminated, the local distribution company shall send notification to affected customers within a reasonable period of being informed of such termination of services. Such notification shall describe the process for selecting a new competitive service provider and note that service will continue to be provided by default service provider if a new competitive service provider is not selected.

Staff Proposed Interim Rule 20.A.8.

Next, Staff proposed an additional rule to prohibit the indirect transfer of information through a third party or another affiliate. Specifically:

> *A local distribution company shall not provide information to an affiliated competitive service provider through either a third party or an affiliate if such information is not made available to all competitive service providers.*

WGES and Enron understand Staff's intent, but assert that its proposal goes too far. They urge the Commission to reject a rule that would bar customers from transmitting their own data through interim intermediaries or agents to suppliers of their choice. They assert that the Task Force Rule 20.A.3., that requires LDCs to make certain information contemporaneously available to all CSPs, is sufficient to prevent indirect violations. AEP-VA also objects and asserts this new rule is unnecessary. It too contends the general prohibitions included in the Task Force rules are adequate. Delmarva joins in the objection and contends that the rule provides a far-reaching restriction on the exchange of information between an LDC and an ACSP.

CES, however, supports the prohibition against the disclosure of otherwise inappropriate information through third parties, but suggests that it apply to all CSPs not just ACSPs. CES notes that there may be information of a proprietary nature relating to an ACSP's daily operational activities that should not be available to all CSPs. CES suggests that the proposed rule should exempt daily operational information provided by the LDC to the ACSP from the general prohibition against disclosure.

In my opinion, however, Staff's proposed rule is not necessary. I agree that Rule 20.A.3 which requires disclosure of certain information to all CSPs contemporaneous with disclosure to an affiliate adequately addresses Staff's concerns.

VPGA Proposed Interim Rule

Finally, VPGA proposed a new rule in this section that has not already been addressed. It urges the Commission to add the following:

> *If the local distribution company receives a request for information regarding the transmission, distribution or provision of electricity and/or natural gas and responds to the same, then it shall provide a list of all competitive service providers in the area and shall not in any manner promote its affiliated competitive service provider.*[83]

[83] VPGA Comments at 6.

Although VPGA's proposal would not appear to impose a burdensome requirement on the LDCs, it addresses a preferential behavior that is generally addressed elsewhere. Promotion of an ACSP over other CSPs would be an undue preference prohibited under Rule 20.A.1. VPGA's proposed rule therefore is not necessary.

B. Proposed interim rules applicable to relationships with retail customers

Task Force Proposed Interim Rule 20.B.1.

> ***A local distribution company shall provide pilot program information and facilitate enrollment of pilot customers pursuant to State Corporation Commission approved pilot programs.***

The Task Force agreed that LDCs should facilitate consumer education and participation in pilots, but specific provisions should be established in individual pilot programs.

Staff only suggests the rule be clarified by adding "Virginia" to the reference to the Commission in the rule.

AEP-VA expressly supports this rule because it recognizes that LDCs should assist in educating customers by providing pilot program information. AEP-VA warns, however, that the costs associated with those efforts will be related to the magnitude of the education program and notes that it has requested permission to defer and recover such costs during the two years following its own pilot.[84]

The Task Force rule as modified by Staff is reasonable.

20.B.1. A local distribution company shall provide pilot program information and facilitate enrollment of pilot customers pursuant to Virginia State Corporation Commission approved pilot programs.

Task Force Proposed Interim Rule 20.B.2.

> ***A local distribution company shall, upon request, provide competitive service providers with the addresses of eligible pilot customers on a non-discriminatory basis consistent with each local distribution company's pilot tariff as approved by the State Corporation Commission. Other customer specific information about pilot customers shall not be provided to competitive service providers without customer authorization.***

[84] AEP-VA Comments at 9.

Historically LDCs have not generally released customer information without approval from the customer. Several members of the Task Force assert that customers expect that same level of privacy to continue. CSPs however need cost-effective ways to provide information to eligible customers. The Task Force rule offers a consensus and requires only customer addresses to be provided on a non-discriminatory basis. The rule is silent, however, on whether an affirmative or negative response from a customer is appropriate.

Roanoke supports the requirement that all information other than addresses be provided only with customer authorization. Columbia Gas observed that it became apparent during the Task Force deliberations that direct mail to consumers was necessary to the success of a retail access program and therefore a customer's address is the minimum information necessary to afford the CSPs the opportunity to market directly to potential customers. Columbia Gas supports the proposed rule as a careful balance between protecting consumer privacy and facilitating competition. Columbia Gas asserts that providing addresses as allowed by the rule is particularly important to CSPs marketing natural gas since unlike electricity, not all energy consumers use natural gas. CSPs may purchase comprehensive lists of residents in most communities in Virginia but use of such lists results in the unnecessary expense of direct mailing to the entire community when many homes may not use natural gas.[85]

Allegheny contends that, at a minimum, CSPs should be provided the name, address and account number of eligible customers.

Columbia Gas also encourages the Commission to permit the release of such information by "negative response." In other words, authorization could be obtained by allowing customers to return a post card indicating their opposition to the release of specific customer information rather than requesting the consumer to return the post card if they assent to the release of specific information. Columbia Gas indicates that the type of authorization allowed could dramatically impact participation given the propensity of consumers to not respond to such requests absent a compelling concern.

AEP-VA also favors the more general language of the Task Force rule to permit the possibility of a negative response, rather than requiring a positive response on the part of customers.[86]

CNG encourages the Commission to consider requiring LDCs to provide account numbers without prior customer authorization as well as addresses. CNG observed that in its experience in other jurisdictions, it has found that access to account numbers streamlines the enrollment process and significantly reduces the costs associated with acquiring new customers. It argues that when suppliers must rely on customers for account numbers there is a high potential for human error communicating the numbers which results in delayed enrollment. CNG recognizes the importance

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[85]Columbia Gas Comments at 5.

[86]AEP-VA Rebuttal Comments at 20.

of customer privacy; however, it contends customer account numbers are normally numbers unique to the utility and do not reflect private information about the customer as do social security numbers or telephone numbers. Therefore, it contends providing that information would not harm the customers.

CNG also encourages the Commission to allow a negative response system for customer consent for disclosure of additional information. It reported that in Pennsylvania, a negative response mechanism protects consumers while still promoting market participation. In Pennsylvania the use of a negative check-off box has promoted the release of information to suppliers and thereby enhanced the development of the competitive market.[87]

Staff generally supports the Task Force rule, but proposes to make editorial changes that are not intended to change the meaning. Staff proposes to change the last sentence as follows:

> *No other customer specific information about pilot customers shall be provided to competitive service providers without customer authorization.*

VRMA recommends changes to reflect that addresses of eligible pilot customers should be provided to a CSP upon a request for information, but that disclosure of any other customer specific information should be provided only upon the customer's positive confirmation.[88]

The Task Force rule modified as recommended by VRMA should be adopted. The Task Force rule allows the LDC to release customers' addresses to CSPs on a non-discriminatory basis yet requires customer authorization to release any additional customer specific information. A rule directing LDCs to release eligible pilot customer addresses promotes more cost-effective access to the market. The release of that information does not infringe on customer privacy, but allows CSPs the means to forward information directly to eligible customers. For pilot programs, however, disclosure should be limited to addresses without customer authorization. With the limited number of customers eligible to participate in a pilot, it should not be difficult or burdensome to get accurate account information from participating consumers. Moreover, I favor "positive confirmation" from consumers for release of any additional information. Although Columbia Gas, among others, expressed concern that post cards would not be returned, LDCs could also explore the electronic medium for procuring customer agreements. The Federal Communications Commission requires such a positive response before telephone companies can release information. The rule should read as follows:

20.B.2. A local distribution company shall, upon request, provide competitive service providers with the addresses of eligible pilot customers on a non-discriminatory basis consistent with each local distribution company's pilot tariff as approved by the <u>Virginia</u> State Corporation Commission. <u>No</u> <u>o</u>ther customer ~~specific~~ information

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[87]CNG Comments at 3.

[88]VRMA Comments at 15.

about pilot customers shall ~~not~~ be provided to competitive service providers without affirmative customer authorization.

Task Force Proposed Interim Rule 20.B.3.

Changes to terms and conditions concerning customer deposits required by the local distribution company to implement the pilot shall be set forth in each local distribution company's pilot tariff approved by the State Corporation Commission.

This rule addresses customer deposits. Staff proposed an alternative rule and specifically addresses limits on deposits:

Pilot program customer deposits held or collected by local distribution companies shall be for only those services provided by the local distribution company to pilot customers.

The proposed Staff rule would allow an LDC to collect and hold customer deposits only for those services provided by the LDC to pilot program customers.

AEP-VA asserts Staff's change is impractical for pilots and will cause customer confusion.

Washington Gas argues the Task Force rule allows each LDC to revise its terms and conditions concerning customers' deposits as it determines necessary and appropriate for its retail access pilot program. Washington Gas opposes Staff's proposal because it contends the rule would create an administrative burden. If a customer signs up for one type of service and then switches to participate in a retail access program, the LDC would be required to refund a portion of the deposit to the customer because the LDC service was reduced. Yet, the LDC remains the supplier of last resort during the pilot. If the CSP terminates service, the LDC will be required to again provide bundled service. Washington Gas argues that it thus may be appropriate for an LDC to retain the original deposit or even increase it as the risk of service may be greater.

Columbia Gas acknowledges that Staff's proposal may be appropriate for a permanent retail choice program but could be unduly burdensome and costly for a pilot. Columbia Gas observes that pilots are temporary by definition. I agree and support the Task Force rule for pilot programs; however, upon permanent implementation of retail access, customer deposits should correspond with service delivered. Thus, I recommend the following rule:

20.B.3. Changes to terms and conditions concerning customer deposits required by the local distribution company to implement the pilot shall be set forth in each local distribution company's pilot tariff approved by the State Corporation Commission.

Task Force Proposed Interim Rule 20.B.4.

> ***Changes to terms and conditions concerning customer disconnection for nonpayment shall be set forth in each local distribution company's pilot tariff approved by the State Corporation Commission.***

No party, including Staff, raised concern with this rule. It is reasonable and should be adopted.

Task Force Proposed Interim Rule 20.B.5.

> ***The Commission shall establish a policy to determine the disposition of partial payments with regard to services provided by competitive service providers and the local distribution company.***

The Task Force could not reach a consensus on the proper treatment of partial payments. Staff recommends prorated treatment. It proposes the following rule:

> *The local distribution company shall apply any partial payments on a prorated basis for monthly services provided by the competitive service provider and the local distribution company.*

Virginia Power recommends that the Commission adopt a rule that requires partial payments to be applied to amounts owed to the LDC prior to amounts owed to the CSP. Virginia Power cites a Commission decision addressing partial payments for local exchange telephone carriers as support for its position.[89] That decision required partial payments to be applied first to local exchange service and then to other services that might be billed by the telephone company. Virginia Power proposes the following language:

> *Partial payments from customers shall be allocated first to local distribution company charges that would result in disconnection and the balance, if any, to other local distribution charges and competitive service provider charges.*[90]

Virginia Power argues CSPs have the option of not serving customers with a poor credit rating. Moreover, once a CSP terminates a customer its exposure to further uncollectible accounts is eliminated. However, the LDC must continue to serve the customer. Virginia Power argues that an LDC has the obligation to serve all customers regardless of credit rating and past payment

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[89]*Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Investigation of the termination of local exchange for failure to pay for long distance services,* Case No. PUC970113, Final Order (February 26, 1999).

[90]Virginia Power Comments at 9.

history, and will continue to have an obligation to invest in new facilities and maintain existing facilities. Virginia Power asserts that application of partial payments to an LDC charge first serves as a consumer protection measure since failure to pay LDC charges could result in disconnection. Virginia Power also argues that prorating partial payments would impose significant administrative burdens on both the LDC and the CSP.

AEP-VA also recommends, and has requested in its own pilot application, that partial payments be credited first to distribution charges, second to transmission charges, and then to charges for competitive services. Such treatment is necessary in order to minimize the potential for customers to be disconnected. If part of the payment goes to the CSP, the customer may be disconnected by the LDC even though a partial payment has been made. AEP-VA opposes Staff's proposal to divide partial payments between the CSP and the LDC. AEP-VA argues that CSPs are free to collect their bills in the same general manner as other competitive businesses. Further, AEP-VA notes that Staff's proposal would give competitors an advantage in collecting bills during the pilot that they might not enjoy in the competitive market and thus distort the pilot results.[91]

Allegheny also supports a rule that ensures that the LDC charges are paid in full first. It too asserts that the CSPs can cancel their contracts with nonpaying customers. Proration, in Allegheny's opinion, can be complex and difficult to administer.

The Virginia Cooperatives also assert that partial payments should be applied to current and past due LDC charges prior to application to supplier charges.

Washington Gas supports a policy to allow the disposition of partial payments to be decided by each utility and set forth in the utility's tariff applicable to the pilot program. Washington Gas asserts that billing options available to customers may vary significantly from program to program and may include separate billings by the utility and CSPs, or consolidated billing by the utility or the CSP. Customers could be negatively affected by an interim rule that limits billing options.[92] Washington Gas, however, also contends that if a uniform rule is adopted, partial payments should first apply to LDC current and past due charges. It asserts that since the LDC is the supplier of last resort, it has the ultimate responsibility for customers returning to regulated service, and therefore should be assured of receiving its billed charges. Tariff provisions permit customer disconnection only for nonpayment of the LDC charge and therefore application of partial payments to the LDC charges first is likely to result in fewer service disconnections. Moreover, Washington Gas asserts that its billing system would require extensive changes to accommodate proration of payments since it does not currently have the ability to prorate payments.

Roanoke Gas also opposes proration.

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[91]AEP-VA Comments at 10.

[92]Washington Gas Comments at 6.

As did the other LDC parties providing comments on this rule, Columbia Gas believes partial payments should be applied to the LDC's outstanding balance first. Alternatively, it urges the Commission to defer consideration of this issue and address partial payments on a case-by-case basis. It also argues that proration would increase the likelihood that LDCs are not fully compensated and consequently increase the likelihood that service would be disconnected. In its pilot program, Columbia Gas allows CSPs to elect either to have Columbia Gas bill customers for the CSP charge or to bill customers directly. Columbia Gas also screens its pilot participants and permits only customers with good payment histories to participate in its retail pilot.[93]

CES also believes that CSPs should have the opportunity to provide billing services. CES opposes Staff's rule to the extent that the proposal implies that billing services are solely within the province of the LDCs.

WGES believes that, as a general rule, customer partial payments should be prorated when LDC services and commodities are offered as a combined or consolidated bill by either a CSP or an LDC. It argues that prorating payments will assure that customers will not consider payment of LDC charges to be all that is necessary to ensure the continuation of utility service. WGES, however, also contends that partial payments should be applied first to all outstanding CSP charges if LDC delivery service charges include allowances for uncollectibles based on a bundled service. WGES asserts that if those charges include such an allowance, consumers could be charged twice for bad debt exposure on the commodity portion of their service.

Although prorating partial payments initially appears to be a balanced compromise, in my final analysis I must consider the consumers' best interests. Partial payments should first be credited to the outstanding bill of the supplier of last resort. During the pilot programs that will be the LDCs. Ms. Fox observed that the decision should consider what is necessary to keep the "lights on." If the CSP's bill is not paid in its entirety, it can terminate service to a customer and may initiate collection action like any other commodity marketer. If the LDC's bill is unpaid, the consumer is subject to disconnection under the terms of the LDC's tariff. However, I would expect the LDC to maintain service if a consumer made a sincere effort to establish a payment plan to pay an outstanding balance because of an unusual financial hardship. Nonetheless, the LDC has a right pursuant to its tariff to terminate service for nonpayment.

Further, I will adopt Virginia Power's proposed language, which closely tracks the rule adopted for local exchange communication companies, however, CSPs should be allowed to process their own bills under the pilots. This rule should read as follows:

20.B.5. Partial payments from customers shall be allocated first to local distribution company charges that would result in disconnection and the balance, if any, to other local distribution company charges and competitive service provider charges.

[93]Columbia Gas Comments at 8.

Task Force Proposed Interim Rule 20.B.6.

> ***The local distribution company shall be the default supplier during the pilot program period pursuant to the prices, terms, and conditions of its State Corporation Commission approved tariffs.***

No party recommended any changes to this rule, and it should be adopted as proposed.

Task Force Proposed Interim Rule 20.B.7.

> ***A local distribution company shall only switch a pilot customer's competitive service provider in accordance with the local distribution company's pilot tariff approved by the State Corporation Commission.***

The Task Force proposed this rule to allow each pilot program to have its own provisions for customers to switch suppliers.

Staff, however, asserts a uniform rule is necessary, and recommends the LDC act as a clearing agent to protect against unauthorized switches consistent with its changes to the requirement for initial enrollment. The Staff proposed rule is:

> *A local distribution company shall enroll or switch a pilot customer's competitive service provider only when contacted and authorized by the customer.*

As with Rule 10.A.5. which provides the CSP rule for enrollment and switching, the LDCs object to Staff's proposal to place the LDC in the role of gatekeeper for the enrollment and switching process. They contend that such a requirement is unduly burdensome and would likely reduce the success of the retail access program because it would preclude some CSPs as well as customers from deriving the full benefit of Internet enrollment, telephonic enrollment, or written authorization returned directly to marketers. As with Rule 10.A.5., I agree, and recommend adoption of the Task Force rule. Therefore, this rule should read as follows:

20.B.7 A local distribution company shall only switch a pilot customer's competitive service provider in accordance with the local distribution company's pilot tariff approved by the State Corporation Commission.

Proposed Task Force Interim Rule 20.C.

> ***Any request for a waiver of any of the provisions in subsections A. or B. above shall be considered by the State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the State Corporation Commission may impose.***

The Virginia Cooperatives urge the Commission to exempt them from these rules. Their witness, Mr. Bjorn, testified that a cooperative's actions and activities with the regard to affiliates and subsidiaries are already closely circumscribed by a variety of explicit regulatory limits prescribed by other agencies and by the implicit practical limits derived from the ownership and operating characteristics of a cooperative. He argued that the cooperatives are subject to the scrutiny of the Internal Revenue Service and the Rural Utility Service.[94] He testified on the unique organizational structure of a cooperative, noting that a cooperative by its bylaws is prohibited from providing a return on any retained equity,[95] and discussed the principal of capital subordination and the concept of democratic control in support of his position.[96]

Although I recognize the unique characteristics of cooperatives, I decline to recommend a broad-based exemption from the application of this rule. Any cooperative that intends to participate, either as an LDC or a CSP, in the emerging competitive marketplace can seek and show justification for waivers specific of any rules that would impose an undue burden.

V. MINIMUM REQUIREMENTS FOR LICENSURE OF ENERGY SERVICE PROVIDERS AND AGGREGATORS

The final section of these rules (20 VAC 5-311-30.) defines the minimum requirements for licensure of energy service suppliers and aggregators, but would not apply to providers of other competitive services such as billing and metering. These rules are intended to provide the Commission with information it needs to determine which applicants should be eligible for a license to sell energy to retail customers in pilot programs. The rules require information on financial and technical capability. In its comments, however, Staff observes that the Commission should continue to evaluate the need to license other types of competitive providers as the market evolves.[97]

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[94]Ex. PRB-5, at 7.

[95]Id. at 6.

[96]Id. at 15.

[97]Ex. Staff-7, at 46.

The Task Force reported considerable discussion in its meetings concerning the authority of the Commission to license suppliers and aggregators.[98] The newly enacted Virginia Code Sections 56-235.8 and 56-576 - 595, however clearly require suppliers and aggregators to obtain a license from the Commission to sell energy on and after January 1, 2002. Any pilot programs implemented to gather information to facilitate the transition to a fully competitive market should be consistent with the minimum requirements that will be effective in that new market.

The licensure requirements were also reportedly discussed at length. The specific discussions will be addressed below, but of a general nature, the Task Force reported that there was considerable discussion about whether aggregators should be held to the same standards as suppliers.[99] In particular, AOBA addressed this concern and argued that its members should be exempt from the licensure requirements. The Task Force rules are drafted to apply to all suppliers and aggregators, but the Task Force recognized that the waiver provisions may be appropriately applied to certain circumstances.[100]

The information required in the Task Force rules was the product of consensus. Again, the Task Force attempted to balance the need to provide the Commission with sufficient relevant information to properly evaluate each applicant without imposing unreasonable burdens that would discourage application and thereby adversely affect the number of entrants in the Virginia marketplace. Staff proposed several additional requirements that will be discussed in detail. It asserts that sufficient information must be provided to allow the Commission to fully assess an applicant before it enters the Virginia market, to monitor the emergence of the competitive market, and to monitor the success of pilot programs.[101]

The Staff also observed that the Commission must address whether these requirements should be applied to suppliers and aggregators already participating in ongoing Virginia pilot programs.

AEP-VA expressed concern with Staff's changes and additions to these rules. Notably, AEP-VA was concerned that the changes impose obligations and requirements that provide little benefit and are unnecessary, but will potentially discourage participation and make the pilots less successful.

Several participants argued the Staff's recommendations to require more information to obtain a license than determined necessary by the Task Force serves no useful purpose. It was argued that the proposed demonstration of technical fitness is more appropriately the subject of individual LDC registration processes rather than minimum requirements governing licensure.

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[98]Ex. TF-1, at 37-38.

[99]Ex. TF-1, at 38.

[100]Ex. TF-1, at 38.

[101]Ex. Staff-7, at 47.

Columbia Gas also generally objects to Staff's additions, and argues that while suppliers should respond to a minimum requirement, the imposition of numerous overly intrusive, administratively burdensome rules may serve to deter market participation in Virginia. It contends that customers can benefit from participation by many marketers offering innovative options.

WGES believes that the Task Force rules on licensure requirements are overly broad as written, but also asserts that Staff's expansion of the rules makes them worse.

A. Proposed interim rules establishing application requirements

Task Force Proposed Interim Rule 30.A.1.

Legal name(s) of the applicant as well as any trade name(s).

No change was suggested to this requirement. It simply requires identification of the applicant and is necessary. It should be adopted.

Task Force Proposed Interim Rule 30.A.2.

a. Name of applicant and business addresses of the applicant's principal office and any Virginia office location(s).

b. A list of states in which the applicant or an affiliate conduct electric or natural gas retail business.

Staff deleted the requirement to restate the applicant's name in this rule. Staff also suggested the rule require the applicant's telephone numbers. There was no objection to those suggestions. Staff, however, also broadened the scope of information required in subsection b., and would substitute the following:

b. A list of states in which the applicant or an affiliate provide rate-regulated services including, but not limited to, electric, natural gas, water, sewer or telecommunications businesses.

Staff argues that additional information about an applicant's or its affiliate's experience in any rate-regulated business could be helpful.[102]

CES asserts that Staff calls for irrelevant information. WGES and Enron also assert that application requirements should be restricted to those issues that are specifically germane to the

[102]Ex. Staff-7, at 50.

issuance of the application. They argue Staff's expansion of this rule is not germane. Information about an applicant's or its affiliate's electric and natural gas retail activities is highly relevant to its ability to provide similar services in Virginia. I am not convinced that information about unrelated, though rate-regulated, activities is relevant. Therefore, I recommend the Commission adopt the Task Force proposed rule with only the minor changes suggested by Staff to paragraph (a). The rule would thus read as follows:

30.A.2. a. ~~Name of applicant and~~ Business addresses and telephone numbers of the applicant's principal office and any Virginia office location(s).

b. A list of states in which the applicant or an affiliate conducts electric or natural gas retail business.

Task Force Proposed Interim Rule 30.A.3.

Names of the applicant's affiliates and subsidiaries. Applicant may satisfy this requirement by providing a copy of its most recent form 10K, Exhibit 21 filing with the Securities and Exchange Commission.

No party recommended any changes to this rule. It should be adopted to facilitate monitoring affiliate relationships.

Task Force Proposed Interim Rule 30.A.4.

Disclosure of any affiliate relationships with Virginia local distribution companies as well as any related affiliated competitive service provider agreements pursuant to which competitive energy services are provided within the Commonwealth of Virginia.

This rule is also necessary to fully identify affiliate relationships. No change was suggested to this rule. It is reasonable and should be adopted.

Task Force Proposed Interim Rule 30.A.5.

Telephone number of the customer service department or the title and telephone number of the customer service contact person.

This information is necessary to allow the Commission to properly direct consumer inquiries. No changes were recommended and it should be adopted as proposed.

Task Force Proposed Interim Rule 30.A.6.

> ***Title and telephone number of the company liaison with the State Corporation Commission.***

Again, Staff recommends broadening the scope of information required and proposes the following language:

> *Name, title, address, telephone number, FAX number, and E-mail address (if available) of the company liaison with the Virginia State Corporation Commission.*

This information is necessary to provide the Commission contact information which can be particularly relevant during Staff review of an application. Staff's additions are not burdensome, are reasonable, and should be adopted. I recommend:

30.A.6. Name, title, address, and telephone number, FAX number, and E-mail address (if available) of the company liaison with the Virginia State Corporation Commission.

Task Force Proposed Interim Rule 30.A.7.

> ***A copy of the applicant's authorization to do business in Virginia from the State Corporation Commission.***

Staff proposes only a minor revision to this rule. It would substitute "to conduct" for "to do" business. There was no objection. Staff's change should be made. The rule should thus read as follows:

30.A.7. A copy of the applicant's authorization to ~~do~~ conduct business in Virginia from the State Corporation Commission.

Task Force Proposed Interim Rule 30.A.8.

> ***In the event the energy service provider intends to collect security deposits or prepayments, the energy service provider shall hold such funds in escrow in Virginia, and shall provide the name and address of the institution holding such deposits or prepayments.***

This rule was proposed by the Task Force to address the concerns of several participants that some providers might leave Virginia with the consumers' deposits. Staff recommends no change to this requirement.

Allegheny believes that requiring escrow accounts to be held in Virginia may be overly restrictive and recommends that CSPs be permitted to provide other security alternatives such as posting a bond or corporate guarantee.

I find the Task Force rule to be reasonable and recommend that it be adopted as proposed.

Task Force Proposed Interim Rule 30.A.9.

> ***If the applicant collects or plans to collect taxes owed to the Commonwealth or to a locality within the Commonwealth, the applicant shall be required to provide proof of financial viability in the form of a minimum bond rating of BBB- by a major rating agency. In lieu of such minimum bond rating other instruments may be used to indemnify the state and locality for taxes to be collected from the customer, such as:***
>
> ***a. A deposit of $25,000 in an escrow account;***
>
> ***b. A guarantee of $25,000 by an affiliated corporation which has a minimum bond rating of BBB- by a major rating agency;***
>
> ***c. The posting of a security bond with the State Corporation Commission in the amount of $25,000; or***
> ***d. A committed line of credit in the amount of $25,000.***

The Task Force proposed this rule to provide the Commission with some assurance of the financial capability of an applicant, and to provide the state with a means to collect taxes if the provider left the state. The Task Force report specifically observed that this report was not intended to protect the LDC or customers from any financial risk associated with their relationships with the CSP.[103] The Task Force also reported that it recognized the bonding requirements might be difficult for a nonprofit organization and that the waiver provisions may offer an appropriate solution on a case-by-case basis.[104] The Task Force arrived at the $25,000 threshold by calculating 10% of Pennsylvania's $250,000 bonding requirement since the Virginia pilots are proposed to be about 10% of the size of Pennsylvania's electric pilot program.

Staff proposes to expand this rule to require other information related to financial fitness. Staff proposes to substitute the following:

> *Applicant must provide sufficient information to demonstrate financial fitness commensurate with the service(s) proposed to be provided. Applicant shall submit the following information related to general financial fitness:*
>
> *a. Any published parent company financial and credit information.*

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[103] Ex. TF-1, at 45.

[104] Id.

b. Applicant's audited balance sheet and income statement for the most recent fiscal year. Published financial information such as 10K's and 10Q's may be provided, if available.

c. Proof of a minimum bond rating of BBB- by a major rating agency. In lieu of such minimum bond rating, other instruments may be provided, such as: a guarantee of $25,000 by an affiliated corporation which has a minimum bond rating of BBB- by a major rating agency; a deposit of $25,000 in an escrow account; the posting of a security bond with the State Corporation Commission in the amount of $25,000; or a committed line of credit in the amount of $25,000.

AEP-VA contends that nothing in the rules precludes, nor should be interpreted to preclude, an LDC from including separate financial assurance requirements in its tariffs or agreements with the CSP.

Allegheny expressed concern with the level of the bonding requirement, and argues that $100,000 is a more appropriate amount. Allegheny asserts that $25,000 will not be sufficient.

Allegheny also supports AEP-VA's position that this rule should not be interpreted to preclude an LDC from including separate financial assurance requirements in agreements with CSPs. Allegheny argues that if customers are forced to return to default service at a time when costs are high and the LDC has not planned for those customers, the cost to supply them may be higher than the LDC's embedded charge. The LDC should be allowed to recover such monetary loss from CSPs in accordance with an approved tariff.

Columbia Gas also reported that the Task Force concluded that LDCs should be permitted to include separate financial assurance requirements in their tariffs or agreements with CSPs. Columbia Gas requests the Commission to specifically acknowledge the LDC's right to include such requirements in tariff agreements as it is not specifically addressed in the proposed rules.

WGES supports the rule as proposed. However, WGES is concerned with any additional financial assurances that may be required by individual LDCs. WGES has experienced a patchwork of LDC financial arrangements in other jurisdictions requiring the posting of various types of financial instruments. WGES had hoped that these interim rules would set a single standard to cover all pilot financial requirements. Thus, it asked the Commission to modify the rule to provide the only financial viability requirement imposed on CSPs. If the Commission does not find such a modification appropriate, WGES asks the Commission to be vigilant in assuring that any additional LDC specific requirements are clear and support entry into the market.[105]

[105] WGES Comments at 5.

WGES and Enron oppose Allegheny's proposed increase to the bonding requirements. They note that LDCs are authorized to ask CSPs for additional program-specific bonding or credit assurances. WGES and Enron also assert that Staff's proposed rewording is not quite sufficient. They assert that the Commission should address several issues if it seeks to alter the Task Force rule. They urge the tying of the bonding requirement to the collection of sales taxes be eliminated. They recognize that securing bonds or other credit instruments requires a clear purpose for which the money is pledged, but assert that the imposition of credit requirements would be most comprehensive if they were pledged against collection of penalties and other amounts due to nonperformance with respect to the pilot programs.

Mr. King with Old Mill also addressed the issue of financial requirements for CSPs. Mr. King notes that the Task Force discussed and ultimately rejected the notion that CSPs should post bonds to ensure that customers would continue to receive service at the price agreed to by the CSP for the duration of the contract. He asserts that such a state mandated level of consumer protection exceeds any benefit currently provided to customers contracting for any other kind of commodity in Virginia and was appropriately rejected by the Task Force.

I support Staff's changes. The Task Force rule is too narrowly drafted. The Commission requires some minimum level of financial information to evaluate the financial viability of an applicant. Staff's suggestions do not impose onerous work product burdens on an applicant. Staff simply seeks published financial and credit information including the audited balance sheet and income statement for the most recent fiscal year. That information should be readily available. Moreover, if any applicant deems such information to be confidential, it can seek a protective order.

I agree with the Task Force recommended level for the bonding requirement and reject Allegheny's request to raise it. The $25,000 level should be sufficient for pilot programs.

I also reject the recommendation of WGES to expand the rule to address all pilot financial requirements. LDC requirements may vary and can be reviewed in the context of the program approval process. The bonding or alternative audit instrument requirement should not be tied solely to collection of state taxes however. The required credit instruments may be pledged against the collection of taxes or penalties and other amounts due to nonperformance under the pilot programs, but Staff's language allows for such alternative purposes.

I recommend the Task Force rule be modified as recommended by Staff:

30.A.9. Applicant must provide sufficient information to demonstrate financial fitness commensurate with the service(s) proposed to be provided. Applicant shall submit the following information related to general financial fitness:

a. Any published parent company financial and credit information.

b. Applicant's audited balance sheet and income statement for the most recent fiscal year. Published financial information such as 10K's and 10Q's may be provided, if available.

c. Proof of a minimum bond rating of BBB- by a major rating agency. In lieu of such minimum bond rating, other instruments may be provided, such as: a guarantee of $25,000 by an affiliated corporation which has a minimum bond rating of BBB- by a major rating agency; a deposit of $25,000 in an escrow account; the posting of a security bond with the State Corporation Commission in the amount of $25,000; or a committed line of credit in the amount of $25,000.

Task Force Proposed Interim Rule 30.A.10.

Identification of the geographic area(s) or pilot(s) in which the applicant proposes to provide service; the type of service(s) it proposes to provide; the class of customers to which it proposes to provide such services; and description of the applicant's experience or other evidence regarding its ability to provide such services.

The Task Force also recommended allowing a provider to file one application and receive one license regardless of the number of pilots in which it intended to participate.

Staff redrafted this rule, and would add information about fuel mix and emissions data, as well as program start dates. Staff asserts that more specific information requirements will assist its review. Staff proposes the following rule:

10. a. Identification of the current or proposed pilot programs in Virginia in which the applicant proposes to participate.

b. List of the geographic area(s) in which the applicant proposes to offer service.

c. Description of the types of service(s) the applicant proposes to offer and identification of the class(es) of customers to which the applicant proposes to offer services. Disclosure, to the extent feasible, of fuel mix and emissions data.

d. Start date(s) on which the applicant proposes to begin delivering services for each applicable pilot.

Allegheny opposes the requirement that an applicant disclose fuel mix and emissions data. It alleges that requiring the information at the application stage is unrealistic.

WGES and Enron also oppose Staff's proposal to include fuel mix and emission data documentation. They further assert that start dates for offering services are commercially sensitive and not germane to issuance of a license.

CES contends that specific details of marketing strategies may be confidential and requiring disclosure would be competitively disadvantageous.

I support the Task Force rule modified to exclude the general requirement for evidence regarding an applicant's ability to provide services. Such evidence is more specifically discussed in Rule 30.A.14. below. If the Commission rejects that rule however, the general requirement in this rule should be retained. Although I support annual disclosure of fuel mix and emissions data to the extent feasible, consistent with the statutory requirement that will apply long term, I agree that the information is not necessary in the licensing process, and further most likely would not be known. Similarly, the date a provider intends to begin providing service is affected by so many variables that an estimate is not likely to be meaningful, and further, is not necessary.

30.A.10. Identification of the geographic area(s) or pilot(s) in which the applicant proposes to provide service; the type of service(s) it proposes to provide; <u>and</u> the class of customers to which it proposes to provide such services<u>.</u>~~; and description of the applicant's experience or other evidence regarding its ability to provide such services.~~

<u>Task Force Proposed Interim Rule 30.A.11.</u>

Disclose whether any application for license or authority to conduct business in a similar retail access program has ever been denied or whether any license or authority issued to it or an affiliate has ever been suspended, revoked or sanctioned.

The Task Force reported that its members had discussed whether legal proceedings in other jurisdictions and other lines of business would provide information relevant to the integrity of an applicant.[106] The Task Force report also included additional language advocated by its consumer representatives, but not recommended by the Task Force at large. That additional language is aimed at preventing consumer fraud. It is as follows:

> *Disclose any Federal or State criminal conviction or civil order that sanctions, fines or enjoins the applicant or an affiliate pursuant to any state or federal consumer protection act.*

In comments to the Task Force report, both Staff and the Consumer Counsel recommend that ESPs be required to disclose additional information about convictions or sanctions involving broader consumer protection matters. Staff proposes to expand the rule to seek collection of

[106]Ex. TF-1, at 47.

information regarding criminal convictions, license revocations and suspensions. Its rule reads as follows:

> *11. a. Disclosure of whether the applicant, an affiliate, a predecessor of either, or any person identified in the application has been convicted of a crime involving fraud or similar activity.*
>
> *b. Disclosure of whether any application for license or authority to conduct business in a similar retail access program has ever been denied or whether any license or authority issued to it or an affiliate has even been suspended, revoked or sanctioned.*

Staff urges the Commission to require broader based information about fraud convictions involving the applicant, an affiliate, a predecessor or anyone identified in the application to protect consumers.

The Consumer Counsel argues that applicants should be required to disclose any violations of federal and state consumer protection acts. Such violations, it is argued, are relevant to the Commission's evaluation of the application. The Consumer Counsel recognizes that CSPs may think this request unduly burdensome and notes that if it is unduly burdensome due to an applicant's specific circumstances, it may request a waiver.

AEP-VA asserts that the additional requirements suggested by Staff and the Consumer Counsel impose additional burdens with no meaningful benefit. However, AEP-VA prefers Staff's proposal over the Consumer Counsel's proposal because the former is slightly less burdensome.

The LDCs and CSPs argue that the additional information sought by Staff and the Consumer Counsel is not germane to the application. They also argue that the additional requirements are burdensome. They contend that many CSPs are affiliated with large corporations with highly diversified businesses and thus would require extensive investigations to satisfy a broad disclosure requirement.

Allegheny also believes that the Task Force rule is somewhat vague, notably questioning what the phrases "similar retail access programs" and "sanctioned" mean. Allegheny believes that revocation, suspension or restriction placed on a license or authority in any type of retail access situation should be disclosed. In addition, Allegheny asserts that "sanctioned" disclosure should be limited to monetary sanctions imposed in excess of $5,000.

WGES argues that even the Task Force rule is overly broad as written and requires an applicant to provide the requested information for itself, its subsidiaries, and affiliates to the extent

that they have participated in the retail programs. WGES asserts that only sanctions relating to the retail sale of energy should have to be reported.[107]

I support the concern of Staff and the Consumer Counsel that a broader disclosure of fraud convictions, may be necessary to measure the integrity of an applicant. After all, retail access programs do not have a long history by which to judge the participants. I understand the large companies' concern with burdensome searches. However, the Staff's proposed rule is focused on convictions, not investigations. Moreover, if a time limit was placed on the convictions required to be disclosed, the information should be readily available and certainly preclude a time consuming search through past corporate records. I therefore will adopt Staff's proposed rule modified only to limit the broader disclosure requirement to the last five years. I recommend the following rule:

30.A.11. a. Disclosure of whether the applicant, an affiliate, a predecessor of either, or any person identified in the application has been convicted of a crime involving fraud or similar activity in the last five years.

b. Disclose<u>ure of</u> whether any application for license or authority to conduct business in a similar retail access program has ever been denied or whether any license or authority issued to it or an affiliate has even been suspended, revoked or sanctioned.

Task Force Proposed Interim Rule 30.A.12.

A $250 pilot registration fee shall accompany each initial application.

No change was recommended to the registration fee required by this rule. It is reasonable and should be adopted.

Proposed Additional Rules

Staff Proposed Interim Rule 30.A.13.

Staff proposed to add several new rules requiring additional information. Specifically, Staff seeks identification of an applicant's principal officers and their resumes. Staff contends that information will support a showing of technical ability. Staff also desires a financial and accounting contact. Staff proposes to add:

a. Identification of the applicant's chief officers along with their professional resumes.

[107]WGES Comments at 4-5.

b. The name, title, address, telephone number, FAX number, and E-mail address (if available) of applicant's custodian of its accounting records.

CES argues that the names and professional resumes of the chief officers is not relevant to an assessment of an ESP's technical abilities unless those individuals are responsible for the daily operation. I agree. Moreover, contact names and telephone numbers are required elsewhere in these rules. Additional financial and accounting contacts for a provider of a commodity that will not be rate regulated is not necessary. Staff's rule should not be adopted.

Staff Proposed Interim Rule 30.A.14.

Staff next proposed a new rule to require information about an applicant's technical ability. Its rule is:

14. To ensure that the present quality and availability of service(s) provided by utilities does not deteriorate, the applicant shall provide sufficient information to demonstrate technical fitness commensurate with the service(s) to be provided, to include:

a. Identity of applicant's officers directly responsible for operations, including names and their experience in the generation of electricity, procurement of electricity and/or procurement of natural gas, and the provision of energy service to retail consumers.

b. Documentation of membership or participation in regional reliability councils or regional transmission organizations.

c. For electric pilot participants, information concerning access to generation and generation reserves. Such information should specify to the extent possible the expected sources of electricity or electricity procurement practices that will be used to support retail sales of electricity in Virginia. For natural gas pilot participants, information regarding pipeline capacity and storage arrangements including assurances that such suppliers will be able to meet the requirements of their essential human needs customers.

d. A list of states in which applicant and/or affiliated companies have participated in similar retail access programs.

It was argued that such detailed information is overly burdensome and would slow entry into the marketplace. CES believes it is not necessary to require disclosure on the specific information required in paragraph (c) which includes proprietary information to make a determination on technical capability.

Yet no other rule proposed by the Task Force fully addresses the technical ability of an applicant. Therefore, I support the addition of Staff's rule. Moreover, Virginia Code § 56-587

anticipates a required demonstration of technical capabilities and of access to generation and generation reserves as part of the licensing process. If the requirements of this rule prove to be too burdensome for an applicant, especially an aggregator, it can seek a waiver of this provision and offer an alternative basis to support a finding that an applicant is technically capable. Staff's proposed rule should be adopted as Rule 30.A.13.

30.A.13. To ensure that the present quality and availability of service(s) provided by utilities does not deteriorate, the Applicant shall provide sufficient information to demonstrate technical fitness commensurate with the service(s) to be provided, to include:

a. Identity of Applicant's officers directly responsible for operations, including names and their experience in the generation of electricity, procurement of electricity and/or procurement of natural gas, and the provision of energy service to retail consumers.

b. Documentation of membership or participation in regional reliability councils or regional transmission organizations.

c. For electric pilot participants, information concerning access to generation and generation reserves. Such information should specify to the extent possible the expected sources of electricity or electricity procurement practices that will be used to support retail sales of electricity in Virginia. For natural gas pilot participants, information regarding pipeline capacity and storage arrangements including assurances that such suppliers will be able to meet the requirements of their essential human needs customers.

d. A list of states in which applicant and/or affiliated companies have participated in similar retail access programs.

Staff Proposed Interim Rule 30.A.15.

Staff also contends that it should review a provider's marketing information, forms, and contracts prior to licensure. It proposes to add:

> *15. A copy of the ESP's customer information brochure and representative examples of forms or contracts that the applicant uses or proposes to use for service provided to residential or small commercial customers.*

Staff, however, recognizes that the forms may vary over time. It also notes that it is not suggesting that the Commission must approve the information. Rather, it would be helpful in

researching complaints.[108] CES argues that this rule would require premature disclosure of confidential marketing information. Although CES agrees that disclosure of such information may assist the Commission in its customer service efforts, disclosure could be required to coincide with its dissemination in the marketplace rather than when licensure is sought.[109]

Since Staff's desire to review marketing information is primarily to support its review of complaints, Staff's proposed rule should not be adopted. I find this rule is not necessary for licensure. Further, an applicant may not have its marketing materials developed at the time of its application. Certainly it will consider them proprietary if already developed.

Staff Proposed Interim Rule 30.A.16.

16. A copy of applicant's dispute resolution procedures.

Lastly, consistent with its recommendation that the dispute resolution procedure of a CSP should be approved by the Commission, Staff recommends that its procedure be provided with the application for licensure. No party objected to this proposal. However, since I rejected Staff's recommendation in Rule 10.A.3. above, this licensure requirement is not necessary.

30.B. Any request for a waiver of any of the provisions in subsection A. above shall be considered by the State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the State Corporation Commission may impose.

Although no party objected to the waiver provisions, AOBA contends that the proposed licensure requirements for ESPs and aggregators result in an unwarranted and unnecessary intrusion on existing relationships between owners of commercial buildings and the organizations that provide operating and management services for those buildings. It argues that firms that provide operating and maintenance services have a long history of acting as agents for the owners in the procurement of energy services. Yet, that long-existing practice could now subject those firms to licensure requirements as aggregators. They argue that they would not take title to energy supplied by others, would not resell energy services to end-users, and would not engage in any activity that would require them to collect taxes for Virginia. AOBA urges the Commission to exempt such firms from licensure requirements as long as they restrict their activities to arranging for the purchase of energy on behalf of the building owners for master-metered energy services within buildings and energy services for common areas and commonly used facilities within commercial office and apartment building complexes, only arrange for purchases of energy on behalf of

[108]Ex. Staff-7, at 58-59.

[109]CES Rebuttal Comments at 12.

commercial building owners from duly licensed ESPs, do not resell to end-users, and do not act as an agent for or offer aggregation services to any individually metered tenant. It is possible, AOBA admits, that its request can be addressed through the waiver provisions provided in the rules; however, AOBA believes a blanket exemption or special status would alleviate burdens on the Commission from processing large numbers of substantially similar requests for waivers.[110]

The purpose of pilot programs is to gather information. The number of firms and the degree of participation from such firms is of interest and clearly impacts the evolution of retail access. Such firms should not be discouraged from participation in the new marketplace, but waivers can be granted on an application-by-application basis. The Task Force rule as modified by Staff should be adopted.

30.B. Any request for a waiver of any of the provisions in subsection A. above shall be considered by the Virginia State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the ~~State Corporation~~ Commission may impose.

Staff's Proposed Instructions and License Format

Staff also proposed instructions for filing applications for licensure and a sample license. Staff contends that a standardized application format provides guidance to applicants and allows Staff to process applications more quickly. Staff also recommended a format for the Commission license. It urges the Commission to include: (1) the types of service(s) authorized, (2) the location(s) where the services can be offered, (3) the class(es) of customers that may be served, (4) identification of the pilot program(s), and (5) any restrictions, terms, or conditions the Commission deems appropriate.[111] Staff also recommends a compliance statement expressly advising the license holder that failure to comply with FERC or Commission orders and/or rules may result in revocation, suspension or restriction of the license.

AEP-VA recommends that the Commission reconvene the Task Force to consider the necessity of and any revisions to such documents rather than adopt such forms in this proceeding. At a minimum, it asserts that Sections F and G should be deleted as they impose new requirements not proposed in the rules and are overly burdensome. AEP-VA also argues that the sample license should clearly state that a licensed CSP is required to register with any LDC in whose territory the CSP proposes to serve customers, and further, to meet any registration requirements of that LDC before it may begin to enroll pilot customers.

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[110]Ex. BRO-6, at 14.

[111]Ex. Staff-7, at 60-61.

Staff recommends the Commission adopt instructions but makes no recommendation for incorporating the instructions into the rules. It is therefore initially unclear whether the draft instructions are offered as guidelines or binding rules. Upon careful reading of the instructions, however, it becomes more apparent that Staff intends the instructions to be binding.

Although the instructions will serve as a useful guide to new applicants, I am reluctant to incorporate them into the rules. They have not been subject to the same level of scrutiny as those rules proposed by the Task Force, Staff or the other parties. Staff can modify application format guidelines as it gains experience with license applications. Further, the substantive content of an application is already addressed in the rules.

The Staff instructions, however, do provide a reasonable roadmap for applicants and will facilitate Staff review. I therefore recommend the Commission review the proposed instructions for filing applications, make appropriate initial modifications and urge applicants to follow those format guidelines, but I do not recommend the format be mandatory.

Specific modifications therefore should be noted. First, the general instructions for the most part are consistent with the rules or provide useful information to the applicant. Paragraphs (F) and (G) however impose ongoing information filing requirements that go beyond the licensure process. I recommend those paragraphs be deleted. Second, several changes should be made to Section II which purports to provide the information required in the rules. Those changes are necessary to comport with the changes to Rules 30.A. et seq. that I recommend herein. Those changes are shown in Appendix E hereto.

Finally, I support the license format[112] proposed by Staff, but do not recommend it be incorporated into the rules in this case. The Commission should have the discretion to issue licenses in the form it deems appropriate.

FINDINGS AND RECOMMENDATIONS

In conclusion, based on the testimony, comments and oral argument received herein and for the reasons set forth above, I find that the Interim Rules Governing Electric and Natural Gas Retail Access Pilot Programs as set forth in Appendix D[113] should be promulgated.

Therefore, ***I RECOMMEND*** that the Commission enter an order that:

1. ***ADOPTS*** the findings of this report;

2. ***PROMULGATES*** the rules set forth in Appendix D; and

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[112]Staff's proposed license format is attached hereto as Appendix F.

[113]Appendix D shows additions and deletions from the Task Force proposed interim rules set forth in Ex. TF-1.

3. ***DISMISSES*** this case from the docket of active proceedings and passes the papers herein to the file for ended causes.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

_____

Deborah V. Ellenberg
Chief Hearing Examiner

Task Force Definitions

Affiliated Competitive Service Provider (ACSP) - Any Competitive Service Provider which is a unit, division, or separate legal entity that controls, is controlled by, or is under common control with a Local Distribution Company or its parent, that provides Competitive Energy Services and/or Related Competitive Energy Services.

Aggregator – A Person licensed by the State Corporation Commission that purchases or arranges for the purchase of Competitive Energy Services as an agent or intermediary for sale to, or on behalf of, two or more retail Customers.

Competitive Energy Service – The provision of electricity and/or natural gas identified in an approved retail access pilot program. (Does not include "Related Competitive Energy Services".)

Competitive Service Provider (CSP) - A Person who sells or offers to sell any Competitive Energy Service and/or other Related Competitive Energy Service to a retail Customer. This excludes a party that supplies electricity and/or natural gas exclusively for its own consumption or the consumption of an affiliate. Some examples of the types of Competitive Service Providers are:

- Energy Service Provider (ESP) – A Person, licensed by the State Corporation Commission, who arranges to provide Customers with electricity and/or natural gas at unregulated prices, including Energy Marketers, and Aggregators. An ESP must rely on the Transmission Facilities of the Transmission Provider and/or the Distribution Facilities of the Local Distribution Company to deliver electricity and/or natural gas to their Customers.
- Billing Agent – A Person, qualified in an approved retail access pilot program, that provides billing services for either competitive electric and/or natural gas services or consolidated billing of both competitive and regulated electric and/or natural gas services.
- Meter Data Management Agent – A Person, qualified in an approved retail access pilot program, that provides meter reading and data management services.
- Meter Service Provider - A Person, qualified in an approved retail access pilot program, that provides metering services including ownership, installation, inspection and auditing of meters.

Customer – Any Person that purchases a Competitive Energy Service and/or Related Competitive Energy Services for consumption or use at one or more metering points or non-metered points of delivery located in the Commonwealth.

Customer Choice (Retail Access) - The opportunity for a retail Customer in the Commonwealth to purchase a Competitive Energy Service and/or Related Competitive Energy Service from any Competitive Service Provider seeking to sell such services to that Customer.

Electronic Data Interchange (EDI) - Computer to computer exchange of business information using common standards for high volume electronic transactions.

Energy Marketer – A Person who takes title to and sells (markets) electricity and/or natural gas.

Local Distribution Company (LDC) – The entity regulated by the State Corporation Commission that owns or controls the distribution facilities required for delivery of electricity or natural gas to the end-user.

Local Distribution Company Account – An individual service location or point of delivery.

Person – Any individual, corporation, partnership, association, company, business, trust, joint venture, or other private legal entity, and the Commonwealth or any municipality.

Related Competitive Energy Services – Services related to the competitive supply of electricity and/or natural gas including, but not limited to, electric and/or natural gas metering, meter data management and billing.

Retail Customer – See definition of "Customer".

Transmission Provider or Upstream Pipeline - The entity regulated by FERC that owns and/or operates the transmission facilities required for the delivery of electricity or natural gas to the Local Distribution Company or end-user.

CHAPTER 311

INTERIM RULES GOVERNING ELECTRIC AND NATURAL GAS RETAIL ACCESS PILOT PROGRAMS

20 VAC 5-311-10. Interim rules governing competitive service providers.

A. The following provisions shall govern the relationship between a competitive service provider and its retail customers:

1. A competitive service provider shall provide accurate, understandable customer solicitation and marketing materials and customer service contracts which include clear pricing terms and conditions, **including an estimated monthly bill for a residential consumer using 1,000 kWh of electricity or 7.5 Mcf of natural gas,** term of customer contract~~, and~~ provisions for termination by either the customer or the competitive service provider **, and a three-day rescission period for the customer.**

2. A competitive service provider claiming its offerings possess unique attributes shall be required to provide**, upon request,** reasonable support for the claim. **All electric service competitive service providers shall disclose to the Commission, to the extent feasible, fuel mix and emissions data on at least an annualized basis.**

3. A competitive service provider shall have in place explicit dispute resolution procedures and clearly identify the addresses and phone numbers of persons authorized to assist customers when they have a complaint.

4. A competitive service provider shall furnish to customers a **24-hour** toll-free telephone number **(1)** for customer inquiries during normal business hours regarding services provided by the competitive service provider **, and (2) that directs the customer where to call in a service emergency.**

5. A competitive service provider shall enroll a customer only when properly authorized by that customer and such authorization is appropriately verified.

6. A competitive service provider shall adequately safeguard customer information, including payment history, unless disclosure is otherwise authorized by the customer or unless the information to be disclosed is already in the public domain.

7. A competitive service provider may terminate a contract with a customer for nonpayment of competitive services with appropriate notification to the customer **as defined under the terms of the individual contract and synchronized with appropriate notification** ~~and~~ to the local distribution company.

8. A competitive service provider requiring a deposit from a customer shall limit the amount of the deposit to no more than the equivalent of a customer's estimated

liability for two months' purchases of energy services from the competitive service provider by that customer.

B. The following provisions shall govern the relationship between a competitive service provider and the local distribution companies and transmission providers.

1. A competitive service provider shall submit to the local distribution company the appropriate name of the entity, business and mailing addresses, and the names, telephone numbers and e-mail addresses of appropriate contact persons**, including a 24-hour emergency contact telephone number and emergency contact person(s).**

2. A competitive service provider shall furnish the local distribution company **and transmission provider** proof of appropriate licensure from the State Corporation Commission.

3. A competitive service provider shall adhere to all requirements of the local distribution company's and transmission provider's schedules, terms and conditions of service as approved by the State Corporation Commission and/or FERC as applicable.

4. An energy service provider shall procure sufficient electric generation and transmission service **or sufficient natural gas delivery capability** to serve the requirements of its firm customers. In the event of a failure to fulfill such obligations, the energy service provider shall be responsible for penalties as prescribed by the local distribution company.

5. A competitive service provider shall comply with all initial and continuing requirements of the State Corporation Commission's licensure process and the local distribution company's and Transmission Provider's registration processes.

6. A competitive service provider shall adhere to standards developed for exchanging data and information in an electronic medium upon implementation of such standards.

C. Any request for a waiver of any of the provisions in subsections A. or B. above shall be considered by the **Virginia** State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the ~~**State Corporation**~~ Commission may impose.

20VAC 5-311-20. Proposed interim rules governing local distribution companies.

A. The following provisions shall govern the relationship between the local distribution company and the competitive service provider:

1. A local distribution company shall not give an affiliated competitive service provider undue preference over a non-affiliated competitive service provider .

2. A local distribution company shall not give undue preference to an affiliated competitive service provider over the interests of any other competitive service provider related to the provision of electric transmission, distribution, generation, or ancillary services, or natural gas supply or capacity. However, this provision is limited to activities that are beyond the jurisdiction of the Federal Energy Regulatory Commission.

3. To the extent the local distribution company provides any competitive service provider information related to the transmission, distribution or provision of electricity and/or natural gas, the local distribution company shall make such information contemporaneously available to all other competitive service providers upon request. The local distribution company may make such information available by posting it on an electronic bulletin board. Nothing in this paragraph shall require the local distribution company to disseminate to all competitive service providers information requested and deemed competitively sensitive by a competitive service provider and supplied by the local distribution company. This paragraph shall not apply to daily operational data provided by the local distribution company to any competitive service provider in the ordinary course of conducting business.

4. Employees of a local distribution company who have responsibility for operations or reliably functions of the distribution**, transmission, or generation** system shall operate independently from an affiliated competitive service provider, and their offices shall be separated from the offices of the affiliated competitive service providers to the maximum extent practicable.

5. The cost of any shared employees, services or facilities between a local distribution company and an affiliated competitive service provider shall be fully and clearly allocated between the entities. Separate books of account and records shall be maintained for each such affiliate. Any local distribution company that provides competitive energy services through a division shall maintain ~~**documentation of the methodologies used to allocate any shared costs to that division**~~ **separate books of accounts and records for the division as if it were an affiliate** and provide such documentation to the State Corporation Commission ~~**staff upon request**~~ **as part of the pilot program approval process**.

6. A local distribution company shall not condition the provision of any distribution services on the purchase of electricity and/or natural gas from an affiliated competitive service provider .

7. Joint advertising shall be prohibited between the local distribution company and any competitive service provider unless made available to all competitive service providers upon the same price, terms and conditions.

8. Neither a local distribution company nor any competitive service provider shall:

   a. Suggest that the distribution services provided by the local distribution company are of a superior quality when electricity and/or natural gas is purchased from a particular competitive service provider ; or

   b. Suggest that the competitive energy services provided by a competitive service provider are being provided by a local distribution company rather than the specified competitive service provider .

9. No affiliated competitive service provider shall trade upon, promote or advertise its relationship with the local distribution company or use the name or logo employed by the local distribution company as its own **in solicitation materials**, without clearly disclosing that the affiliated competitive service provider is not the same ~~**company**~~ **provider** as the local distribution company.

10. A local distribution company shall establish and file ~~**with the State Corporation**~~ **for** Commission **approval of** dispute resolution procedures to address complaints alleging violations of ~~**these**~~ rules **in Section A.**

11. Notwithstanding any other provision of these rules, in emergency situations, a local distribution company ~~**is authorized to**~~ **may** take any actions that may be necessary to ensure public safety and reliability of the distribution system. The Virginia State Corporation Commission upon a reasonable claim of inappropriate action may ~~**later**~~ investigate **and take** such **corrective** actions **as may be appropriate.**

12. In the event that a competitive service provider's services are permanently terminated, the local distribution company shall send notification to affected customers within a reasonable period of being informed of such termination of services. Such notification shall describe the process for selecting a new competitive service provider and note that service will continue to be provided by default service provider if a new competitive service provider is not selected.

B. The following provisions shall govern the relationship between the local distribution company and its retail customers:

1. A local distribution company shall provide pilot program information and facilitate enrollment of pilot customers pursuant to **Virginia** State Corporation Commission approved pilot programs.

2. A local distribution company shall, upon request, provide competitive service providers with the addresses of eligible pilot customers on a non-discriminatory basis consistent with each local distribution company's pilot tariff as approved by the **Virginia** State Corporation Commission. **No o**ther customer ~~**specific**~~ information about pilot customers shall ~~**not**~~ be provided to competitive service providers without **affirmative** customer authorization.

3. Changes to terms and conditions concerning customer deposits required by the local distribution company to implement the pilot shall be set forth in each local distribution company's pilot tariff approved by the State Corporation Commission.

4. Changes to terms and conditions concerning customer disconnection for nonpayment shall be set forth in each local distribution company's pilot tariff approved by the State Corporation Commission.

5. Partial payments from customers shall be allocated first to local distribution company charges that would result in disconnection and the balance, if any, to other local distribution company charges and competitive service provider charges.

6. The local distribution company shall be the default supplier during the pilot program period pursuant to the prices, terms, and conditions of its State Corporation Commission approved tariffs.

7. A local distribution company shall only switch a pilot customer's competitive service provider in accordance with the local distribution company's pilot tariff approved by the State Corporation Commission.

C. Any request for a waiver of any of the provisions in subsections A. or B. above shall be considered by the **Virginia** State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the ~~**State Corporation**~~ Commission may impose.

20 VAC 5-311-30. Minimum requirements for licensure of energy service providers and aggregators.

A. Any application for a license to be an energy service provider or aggregator shall include at least the following provisions:

1. Legal name(s) of the applicant as well as any trade name(s).

2. a. ~~**Name of applicant and**~~ **B**usiness addresses **and telephone numbers** of the applicant's principal office and any Virginia office location(s).
   b. A list of states in which the applicant or an affiliate conducts electric or natural gas retail business.

3. Names of the applicant's affiliates and subsidiaries. Applicant may satisfy this requirement by providing a copy of its most recent form 10K, Exhibit 21 filing with the Securities and Exchange Commission.

4. Disclosure of any affiliate relationships with Virginia local distribution companies as well as any related affiliated competitive service provider agreements pursuant to which competitive energy services are provided within the Commonwealth of Virginia.

5. Telephone number of the customer service department or the title and telephone number of the customer service contact person.

6. **Name, t**itle**, address,** and telephone number**, FAX number, and E-mail address (if available)** of the company liaison with the **Virginia** State Corporation Commission.

7. A copy of the applicant's authorization to ~~**do**~~ **conduct** business in Virginia from the State Corporation Commission.

8. In the event the energy service provider intends to collect security deposits or prepayments, the energy service provider shall hold such funds in escrow in Virginia, and shall provide the name and address of the institution holding such deposits or prepayments.

9. Applicant must provide sufficient information to demonstrate financial fitness commensurate with the service(s) proposed to be provided. Applicant shall submit the following information related to general financial fitness:

a. Any published parent company financial and credit information.

b. Applicant's audited balance sheet and income statement for the most recent fiscal year. Published financial information such as 10K's and 10Q's may be provided, if available.

c. Proof of a minimum bond rating of BBB- by a major rating agency. In lieu of such minimum bond rating, other instruments may be

provided, such as: a guarantee of $25,000 by an affiliated corporation which has a minimum bond rating of BBB- by a major rating agency; a deposit of $25,000 in an escrow account; the posting of a security bond with the State Corporation Commission in the amount of $25,000; or a committed line of credit in the amount of $25,000.

10. Identification of the geographic area(s) or pilot(s) in which the applicant proposes to provide service; the type of service(s) it proposes to provide; **and** the class of customers to which it proposes to provide such services**.~~; and description of the applicant's experience or other evidence regarding its ability to provide such services~~**.

11. **a. Disclosure of whether the applicant, an affiliate, a predecessor of either, or any person identified in the application has been convicted of a crime involving fraud or similar activity in the last five years.**

b. Disclos**eure of** whether any application for license or authority to conduct business in a similar retail access program has ever been denied or whether any license or authority issued to it or an affiliate has ever been suspended, revoked or sanctioned.

12. A $250 pilot registration fee shall accompany each initial application.

13. To ensure that the present quality and availability of service(s) provided by utilities does not deteriorate, the Applicant shall provide sufficient information to demonstrate technical fitness commensurate with the service(s) to be provided, to include:

a. Identity of Applicant's officers directly responsible for operations, including names and their experience in the generation of electricity, procurement of electricity and/or procurement of natural gas, and the provision of energy service to retail consumers.

b. Documentation of membership or participation in regional reliability councils or regional transmission organizations.

c. For electric pilot participants, information concerning access to generation and generation reserves. Such information should specify to the extent possible the expected sources of electricity or electricity procurement practices that will be used to support retail sales of electricity in Virginia. For natural gas pilot participants, information regarding pipeline capacity and storage arrangements including assurances that such suppliers will be able to meet the requirements of their essential human needs customers.

d. A list of states in which applicant and/or affiliated companies have participated in similar retail access programs.

B. Any request for a waiver of any of the provisions in subsection A. above shall be considered by the **Virginia** State Corporation Commission on a case-by-case basis, and may be granted upon such terms and conditions as the ~~**State Corporation**~~ Commission may impose.

Instructions for Filing Applications
For Licensure of Energy Service Provider or Aggregator

I. General Instructions

A) Applications must be filed with the Document Control Center (DCC) at the following mailing address:

Document Control Center
Tyler Building – 1st Floor
P.O. Box 2118
Richmond, VA 23218

DCC must have an original application and four (4) copies. To expedite processing, please send additional copies of the application directly to the following:

Director, Economics and Finance
Virginia State Corporation Commission
P. O. Box 1197
Richmond, VA 23218

Director, Energy Regulation
Virginia State Corporation Commission
P.O. Box 1197
Richmond, VA 23218

Director, Public Utility Accounting
Virginia State Corporation Commission
P.O. Box 1197
Richmond, VA 23218

B) A filing fee must accompany the original application for licensure. Applications that do not include the filing fee will not be regarded as filed and no further processing will occur. Checks for such fees should be made payable to "State Corporation Commission".

C) Each application for licensure shall follow a standardized format covering each of the items enumerated in Section II. The standardized application will enable the Commission to process more efficiently the request for licensure. Any additional supporting information shall be attached as exhibits to the application. Applications that do not provide all of the information in Section II will not be regarded as filed, and no further processing will occur. If applicant has received a waiver for any of the information requirements, applicant shall provide a copy of the waiver in place of the information requirement(s).

D) If any application fails in any respect to be complete, the application will not be regarded as filed. For incomplete applications, the Commission Staff will inform applicant what is needed before the application will be considered filed.

E) Upon review and approval of the application, the Commission shall issue a license to sell energy to retail customers in the pilot access program(s).

~~F) At any time during or at the end of the pilot programs, the company shall file with the Commission, information about its energy supply transactions and participation in the pilot program(s) as directed by the Commission.~~

~~G) The Company shall file an update to its original application if there are changes to the information submitted.~~

II. Information Filing Requirements:

1. **IDENTITY OF APPLICANT:** Legal name(s) of the Applicant as well as any trade name(s).

2. **ADDRESS AND TELEPHONE NUMBER:** Business address and telephone number of the Applicant's principal office and any Virginia location(s).

3. **CONTACT PERSON:** The name, title, address, telephone number, FAX number, and E-mail address (if available) of the person to whom questions about this Application should be addressed.

4. **CUSTOMER SERVICE CONTACT:** Telephone number of the customer service department or the title and telephone number of the customer service contact person.

5. **AUTHORIZATION TO CONDUCT BUSINESS:** A copy of the Applicant's authorization to conduct business in Virginia from the State Corporation Commission.

6. **AFFILIATES:** Names of the Applicant's affiliates and subsidiaries. Applicant may satisfy this requirement by providing a copy of its most recent Form 10K, Exhibit 21 filing with the Securities and Exchange Commission.

7. **AFFILIATE RELATIONSHIPS:** Disclose any affiliate relationships with Virginia local distribution companies as well as any related affiliated competitive service provider agreements pursuant to which competitive energy services are provided within the Commonwealth of Virginia.

8. **LOCATIONS:** A list of the states in which the Applicant or an affiliate ~~provide rate-regulated services including, but not limited to electric, natural gas, water, sewer or telecommunications business(es)~~ conduct electric or natural gas retail business .

9. **PILOT PARTICIPATION:** List the current or proposed pilot programs in Virginia in which the Applicant proposes to participate.

10. **SERVICE AREA:** Generally list the geographic area(s) in which the Applicant proposes to offer service.

11. **SERVICES AND CUSTOMERS:** Generally describe the type of service(s) the Applicant proposes to offer. Additionally, identify the class(es) of customers to which the Applicant proposes to offer services. ~~Disclose, to the extent feasible, fuel mix and emissions data.~~

~~12. **START DATE:** State the date(s) on which the Applicant proposes to begin delivering services for each applicable pilot.~~

13. **ESCROW SECURITY DEPOSITS AND PREPAYMENTS:** State the name and address of the Virginia institution holding security deposits and prepayments in escrow.

14. **FINANCIAL FITNESS:** Applicant must provide sufficient information to demonstrate financial fitness commensurate with the service(s) proposed to be provided. Applicant shall submit the following information related to general financial fitness:

a. Any published parent company financial and credit information.
b. Applicant's audited balance sheet and income statement for the most recent fiscal year. Published financial information such as 10K's and 10Q's may be provided, if available.
c. Proof of a minimum bond rating of BBB- by a major rating agency. In lieu of such minimum bond rating, other instruments may be provided, such as: a guarantee of $25,000 by an affiliated corporation which has a minimum bond rating of BBB- by a major rating agency; a deposit of $25,000 in an escrow account; the posting of a security bond with the State Corporation Commission in the amount of $25,000; or a committed line of credit in the amount of $25,000.

~~15. **EMPLOYEE INFORMATION:** Applicant must provide the following information:~~
~~a. Identity of Applicant's chief officers along with their professional resumes.~~
~~b. The name, title, address, telephone number, FAX number, and E-mail address (if applicable) of Applicant's custodian of its accounting records.~~

16. **TECHNICAL FITNESS:** To ensure that the present quality and availability of service(s) provided by utilities does not deteriorate, the Applicant shall provide sufficient information to demonstrate technical fitness commensurate with the service(s) to be provided, to include:

a. Identity of Applicant's officers directly responsible for operations, including names and their experience in the generation of electricity, procurement of electricity and/or procurement of natural gas, and the provision of energy service to retail consumers.
b. Documentation of membership or participation in regional reliability councils or regional transmission organizations.
c. <u>For electric pilot participants</u>: include information concerning access to generation and generation reserves. Such information should specify to the extent possible the expected sources of electricity or electricity procurement practices that will be used to support retail sales of electricity in Virginia.

<u>For natural gas pilot participants:</u> provide information regarding pipeline capacity and storage arrangements including assurances that such suppliers will be able to meet the requirements of their essential human needs customers.

d. List of states in which applicant and/or affiliated companies have participated in retail access programs.

17. **AFFIDAVIT AS TO SERVICE AND FITNESS:** Attach to the Application an affidavit as follows:

AFFIDAVIT

Commonwealth of _____

County of _____

_____, Affiant, being duly sworn according to law, deposes and says that:

He is the _____(office of Affiant) of _____(Name of Applicant);]

That he is authorized to and does make the affidavit for said Applicant;

That _____, the Applicant herein, asserts that it possesses the requisite technical, managerial, and financial fitness to render electric service within the Commonwealth of Virginia and that the Applicant will abide by all applicable federal and state laws and regulations and by the decisions of the Virginia State Corporation Commission.

That the facts above set forth are true and correct and that he expects to be able to prove the same at any hearing hereof.

_____

Signature of Affiant

Sworn and subscribed before me this _____ day of _____, 19___.

_____

Signature of official administering oath

My commission expires _____.

18. TAXATION: Provide the State Tax Account number or similar number of the Applicant: _____.

In certification that the supplier will pay in full all taxes due from the supplier as required, the Applicant will attach to the Application an affidavit as follows:

AFFIDAVIT

Commonwealth of _____

County of _____

_____, Affiant, being duly sworn according to law, deposes and says that:

He is the _____(office of Affiant) of _____(Name of Applicant);]

That he is authorized to and does make this affidavit for said Applicant;

That _____, the Applicant herein, certifies to the Commission that it is subject to and will pay the full amount of taxes imposed by _____. The Applicant acknowledges that failure to pay such taxes or otherwise comply with the taxation requirements shall be cause for the Commission to revoke the license of the Applicant.

That the facts above set forth are true and correct and that he expects to be able to prove the same at any hearing hereof.

_____

Signature of Affiant

Sworn and subscribed before me this ____ day of _____, 19__.

_____

Signature of official administering oath

My commission expires _____.

~~19. **STANDARDS, BILLING, PRACTICES, TERMS AND CONDITIONS OF PROVIDING SERVICE AND CONSUMER EDUCATION:** Provide a copy of the customer information brochure and representative examples of all standard forms or contracts that Applicant uses, or proposes to use, for service provided to residential or small commercial customers. Energy and services should be priced in clearly stated terms to the extent possible. Common definitions should be used. All consumer contracts or sales agreements should be written in plain language with any exclusions, exceptions, add-ons, package offers, limited time offers or other deadlines, penalties, and/or procedures for ending contracts prominently communicated.~~

20. **DISCLOSURE/COMPLIANCE:** State specifically whether the Applicant, an affiliate, a predecessor of either, or any person identified in this Application has been convicted of a crime involving fraud or similar activity in the last five years. Disclose whether any application for license or authority to conduct business in a similar retail access program has ever been denied or whether any license or authority issued to it or an affiliate has ever been suspended, revoked or sanctioned.

~~21. **DISPUTE RESOLUTION PROCEDURES:** Provide a copy of applicant's dispute resolution procedures.~~

22. **APPLICATION FEE:** Enclose a licensing fee of $250, made payable to "State Corporation Commission".

SAMPLE LICENSE

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

LICENSE NO.

<Company name>

is hereby granted a license under Section 56-234 of the Code of Virginia to provide the following products and services

in conjunction with the following local distribution company pilot programs

to the following customer classes within the Commonwealth of Virginia

under the following terms, conditions, or restrictions

This license expires on _____

Failure of the licensee to comply with any applicable FERC or State Corporation Commission Orders and/or Rules and all state and federal laws may result in the revocation, suspension or restriction of this license.

Dated at Richmond, Virginia _____

STATE CORPORATION COMMISSION

By _____

Commissioner