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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 3, 2001

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION CASE NO. PUE010313

Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities

ORDER

By the Commission's June 12, 2001, Order Establishing Proceeding and Prescribing Notice, we initiated this proceeding to establish new filing requirements for entities seeking authority to construct and operate electric generating facilities in Virginia.

We noted in our June 12 Order that significant changes have occurred since the adoption of the current rules,[1] both in the electric utility industry in Virginia and in the governing statutes. Principal among these changes is the enactment in 1999 of the Virginia Electric Utility Restructuring Act ("the Restructuring Act" or "the Act"),[2] which, effective January 1,

[1] 20 VAC 5-302-10 et seq.

[2] Chapter 23 of Title 56 of the Code of Virginia, §§ 56-576 et seq.

2002, makes the generation of electric energy no longer subject to regulation under Title 56 except as specified in Chapter 23.[3]

We further noted in our earlier Order that the Commission Staff had, in preliminary informal discussions with interested parties, identified a legal issue affecting the Staff's proposed amendments to the regulations. The question is whether §§ 56-234.3 and 56-265.2 of the Code of Virginia will continue to have applicability after January 1, 2002, with regard to the construction and operation of electric generating facilities, or whether the Restructuring Act supplants these provisions.

The Staff and the following parties filed briefs on this threshold legal issue: Appalachian Power Company d/b/a American Electric Power ("AEP-Virginia"); Competitive Power Ventures, Inc. ("CPV"); Dynegy Power Corp. ("Dynegy"); Tenaska, Inc. ("Tenaska"); The Potomac Edison Company, d/b/a Allegheny Power ("AP"); and Virginia Electric and Power Company ("Dominion Virginia Power").

AEP-Virginia, CPV, Tenaska, AP, and Dominion Virginia Power all argued that the Restructuring Act, particularly §§ 56-577 A 3 and 56-580 D, operates to supersede §§ 56-234.3 and 56-265.2 after January 1, 2002. Dynegy argued that §§ 56-234.3 and 56-265.2 continue to be applicable notwithstanding provisions of

[3] § 56-577 A 3.

the Restructuring Act. The Staff stopped short of contending that §§ 56-234.3 and 56-265.2 continue to be applicable, but argued that the "deregulation" of retail rates for generation does not necessarily render obsolete statutes regulating construction and operation of generating facilities. The Staff urged us to scrutinize any argument relying on a theory of repeal by implication where the General Assembly has not been explicit.

We have considered carefully the briefs of the parties' and Staff, the relevant statutes in Chapters 10, 10.1, and 23 of Title 56, rules of statutory construction, and our prior decisions that touch upon this issue. Although we believe the Restructuring Act is not as clear as it should have been on the issue, we conclude that the Act does operate so that provisions of the Act supplant §§ 56-234.3 and 56-265.2 on and after January 1, 2002.

The statutes we have examined do present certain questions and ambiguities relative to their effect upon one another. It is clear, however, that the Restructuring Act was designed to effectuate a fundamental change in the law, particularly with respect to the generation of electric energy on and after January 1, 2002. Section 56-577 A 3 of the Act states:

> On and after January 1, 2002, the generation of electric energy shall no

> longer be subject to regulation under this title except as specified in this chapter.

With respect to generation, § 56-265.2 is not incorporated by reference in Chapter 23 nor is its applicability preserved in the chapter as are certain other statutes.[4] Moreover, § 56-580 D is designed to replace § 56-265.2 with respect to generation. Specifically, much of the text of § 56-580 D that authorizes the Commission to permit the construction of generating facilities is drawn virtually verbatim from § 56-265.2 B. The material difference is that § 56-580 D requires only two of the three findings required under § 56-265.2 B,[5] eliminating the requirement that a proposed facility will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth.[6] It would not be logical for

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[4] For example, § 56-580 D does incorporate § 56-46.1. Sections 56-579 D with respect to transmission, and 56-580 E (the subsection immediately following § 56-580 D) with respect to distribution, expressly preserve the Commission's existing authority contained in Chapter 10.1. No such preservation appears in Chapter 23 with respect to generation for § 56-265.2.

[5] Both statutes require a showing that the proposed generating facility and associated facilities (i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility and (ii) are not otherwise contrary to the public interest. Both statutes also require us to consider the effect of facilities on the environment pursuant to § 56-46.1.

[6] The elimination of this requirement is not inconsistent with the Restructuring Act's regulatory treatment of the pricing for generation services on and after January 1, 2002. Moreover, the elimination of "no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth" as a criterion does not necessarily obligate us to approve an application where it is demonstrated that a proposed facility's construction and operation would, in fact, have this effect. We need not and do not decide here what factors may be considered under the public interest criterion.

the General Assembly to draft a new statute (§ 56-580 D) that merely duplicates a portion of an existing statute (§ 56-265.2 B). If § 56-265.2 were to continue to apply to applications for approval of electric generating facilities after January 1, 2002, § 56-580 D would serve no purpose other than to set forth, virtually verbatim, a lesser-included test already stated in § 56-265.2 B. We cannot presume that the General Assembly sought to achieve such a peculiar result.[7]

Section 56-234.3, like § 56-265.2, is neither included by reference nor otherwise specified in Chapter 23 so as to indicate its continuing applicability with respect to generation. Further, § 56-234.3 is part of the rate base, rate of return pricing provisions of Chapter 10 that are explicitly replaced by the pricing provisions of Chapter 23 with respect to retail generation.

In summary, we have determined that §§ 56-234.3 and 56-265.2 have been supplanted by the Restructuring Act with respect to generation. In reaching this conclusion we have primarily relied on three factors: the language of § 56-577 A 3; the absence of language in Chapter 23 preserving the applicability of §§ 56-234.3 and 56-265.2 with respect to generation while a

[7] While we find that § 56-265.2 is superseded by § 56-580 D as the former applies to the construction and operation of electrical generating facilities and associated facilities, § 56-265.2 includes provisions applicable to other facilities such as transmission and distribution facilities, and those provisions are not disturbed.

number of other provisions are so preserved with respect to other areas such as transmission and distribution; and, equally important, the fact that the functions of §§ 56-234.3 and 56-265.2 are replaced by provisions of the Act. While these statutes will no longer apply to generation after January 1, 2002, the Act does not leave a void in their place.[8] Section 56-580 D provides a substitute procedure for approval of generating facilities formerly governed by 56-265.2. Section 56-234.3, part of Chapter 10's traditional ratemaking provisions, is now replaced by a fundamentally different ratemaking structure for retail generation that relies heavily on the marketplace.

Accordingly, IT IS ORDERED THAT:

(1) Further consideration of the Staff's proposed regulations in this proceeding shall be conducted consistent with our findings stated herein regarding §§ 56-234.3 and 56-265.2.

(2) This matter is continued generally for further proceeding consistent with our Order of June 12, 2001.

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[8] Our decision here extends only to the applicability of §§ 56-234.3 and 56-265.2. We do not consider at this time the Restructuring Act's effect on the applicability of any other provision of Title 56.