

REQUIRING THE PROVISION OF ELECTRICITY IN EMERGENCIES

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I. Virginia law

A. Article 3 [Powers of Commission in Relation to Service] of Chapter 10, Title 56

Emergency sales:

§ 56-249.1: "The Commission may require a public utility to transfer to another public utility of like business, gas, water or electricity, whenever the public health, welfare or safety shall be found to so require [T]he transferring public utility shall be compensated, at a rate fixed by the Commission, for all such deliveries by the receiving public utility."

Commonwealth v. Washington Gas Light Co., 221 Va. 315, 269 S.E.2d 820 (1980): "Section 56-249.1 merely authorizes the Commission to require a public utility to make emergency spot sales at prices fixed by the Commission."

Emergency curtailment of service:

§ 56-250. (1) Whenever it shall appear by satisfactory evidence that any public utility furnishing in this State power, heat, light or water cannot supply all of its customers the usual requirements of each by reason of strikes, accidents, want of fuel, or for any other reason, the Commission may authorize such public utility to take such action as, in the opinion of the Commission, will minimize adverse impact on the public health and safety and facilitate restoration of normal service to all customers at the earliest time practicable.

(2) To facilitate implementation of this section, the Commission may require any such public utility to file, as a part of the rules and regulations referred to in § 56-236, its plan for curtailment of service in such a condition of emergency or shortage. ...

Scope:

§ 56-232: The term "public utility" as used in §§ . . . 56-246 to 56-250 shall mean and embrace every corporation (other than a municipality), company, individual, or association of individuals or cooperative . . . , that now or hereafter may own, manage or control any plant or equipment or any part of a plant or equipment within the Commonwealth for the . . . production, transmission, delivery, or furnishing of heat, . . . light, [or] power, . . . either directly or indirectly, to or for the public.

"[T]he term 'public utility' as herein defined shall not be construed to include any corporation created under the provisions of Title 13.1 unless the articles of incorporation expressly state that the corporation is to conduct business as a public service company."

Other exclusions:

- Qualifying small power producers under PURPA not exceeding 7.5 megawatts of rated capacity
- Aggregator of the production of such small power producers, provided that the portion of the output of any qualifying small power producer which is sold at retail shall not be sold to residential consumers
- Cogenerators selling wholesale power

Opinion to Hon. Dianna W. Robbins, 1991 Op. Atty Gen. Va. 296 (June 21, 1991):

The firm that operates the facility deals exclusively in cogeneration -- that is, the combined production of electrical power and useful thermal energy, such as heat or steam. The firm is not a public service corporation regulated by the State Corporation Commission pursuant to Chapter 10 of Title 56 . . . of the Code of Virginia, governing heat, light, power, water and other utility companies. The firm sells steam to large industrial users and excess electricity generated incident to the production of steam to a Virginia public service corporation that does provide electric utility service at retail rates to consumers. *The cogeneration firm's wholesale rates for electric power provided to the public utility are regulated by the Federal Energy Regulatory Commission.* (Emphasis added)

B. Chapter 17 -- State Operation of Public Utilities

§ 56-510: "Whenever in the judgment of the Governor there is an imminent threat of substantial curtailment, interruption or suspension in the operation of any public utility hereinabove mentioned he shall promptly make an investigation to determine whether, in his opinion, an actual curtailment, interruption or suspension of operation will constitute a serious menace or threat to the public health, safety or welfare, and if he concludes that it will, he shall forthwith issue an executive proclamation so declaring and stating that at the time of such curtailment, interruption or suspension of operation he will take immediate possession of the utility, its plant and equipment, or so much thereof as may be necessary, for the use of and operation by the Commonwealth. Where the Governor finds it advisable for effectuation of the purposes hereof he may by proclamation advance or defer such taking of possession."

§ 56-523: "The words 'utilities' or 'public utilities' when used in this chapter shall be construed to mean any person, partnership, association or corporation, engaged in the business of furnishing electric power, water, light, heat, gas, transportation or communication, or any one or more of them, to the people of Virginia.

C. Virginia Electric Utility Restructuring Act Provisions

§ 56-577. A. 3: "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."

§ 56-581. A: "[S]ubject to the provisions of this chapter after the date of customer choice, the Commission no longer shall regulate rates and services for the generation component of retail electric energy sold to retail customers."

§ 56-586 [Emergency Service Provider]: "On and after January 1, 2001, if any supplier fails to fulfill an obligation, resulting in the failure of retail electric energy to be delivered into the control area serving the supplier's retail customer, the entity fulfilling the control area function, or, if applicable, the regional transmission entity or other entity as designated by the Commission, shall be responsible for charging the defaulting supplier for the full cost of replacement energy, including the cost of energy, the cost incurred by others as a result of the default, and the assessment of penalties as may be approved either by the Commission, to the extent not precluded by federal law, or by the Federal Energy Regulatory Commission. The Commission, as part of the rules established under § 56-587, shall determine the circumstances under which failures to deliver electricity will result in the revocation of the supplier's license."

§ 56-585 [Default service]: In designating default service providers, "the Commission:
1. Shall take into account the characteristics and qualifications of prospective providers, including proposed rates, experience, safety, reliability, corporate structure, access to electric energy resources necessary to serve customers requiring such services, and other factors deemed necessary to ensure the reliable provision of such services, to prevent the inefficient use of such services, and to protect the public interest."

§ 56-587. B. 2: "Any license issued by the Commission pursuant to this section to a person seeking to sell, offering to sell, or selling electric energy to any retail customer in the Commonwealth may be conditioned upon the licensee furnishing to the Commission prior to the provision of electric energy to consumers proof of adequate access to generation and generation reserves."

D. Emergency powers of the Governor in general

Virginia Code § 44-146.17: The Governor is empowered "To proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to . . . control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services programs."

II. Texas Provisions

Emergency powers of Governor

Vernon's T.C.A., Government Code § 418.017: (a) "The Governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster."

(c) "The Governor may commandeer or use any private property if the Governor finds it necessary to cope with a disaster, subject to the compensation requirements of this chapter."

Texas Restructuring Act -- Senate Bill 7 (1999)

Chapter 39 -- Restructuring of Electric Utility Industry (Acts 1999, 79th Leg., ch. 405)

Vernon's T.C.A., Utilities Code § 31.002 (5): "Electric Reliability Council of Texas" or "ERCOT" means the area in Texas served by electric utilities, municipal owned utilities, and electric cooperatives that is not synchronously interconnected with electric utilities outside the state."

ERCOT is a non-profit corporation serving as the independent system operator of the Texas Interconnection, a power region covering 84 percent of Texas. In the non-ERCOT areas of Texas, energy control center functions will be performed by RTOs pursuant to FERC Order 2000.

§ 39.151. (g): The existing ISO in ERCOT will meet the criteria for ensuring the reliability of the regional electric network.

(i) The commission may delegate authority to the existing ISO in ERCOT to enforce operating standards within the ERCOT regional electrical network and to establish and oversee transaction settlement procedures. The commission may establish the terms and conditions for the ERCOT ISO's authority to oversee utility dispatch functions after the introduction of customer choice.

(j) Power generators "shall observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines and procedures established by the independent system operator in ERCOT."

ERCOT Protocols (Revised July 31, 2001; effective January 1, 2002):

Section 5.6 -- Emergency and Short Supply Operation: ERCOT, as the single Control Area Operator, is responsible for maintaining reliability in normal and emergency operating conditions.

ERCOT will issue an Operating Condition Notice to inform all qualified scheduling entities (QSEs) of a possible future need for more facilities or load due to conditions that could affect ERCOT System reliability. Reasons for Operating Condition Notices include unplanned transmission outages, freezing temperatures, hurricanes, wet weather, and ice storms.

ERCOT will issue an Emergency Notice if (i) ERCOT cannot maintain minimum reliability standards during the Operating Period using every Resource practicably obtainable from the market, (ii) ERCOT is in an unreliable condition, and (iii) immediate action must be taken to avoid or relieve an overloaded transmission element.

Step 1 Response — ERCOT will:

- Provide dispatch instructions to qualified scheduling entities to start all Resources that are available in the time frame of the emergency. Similarly, ERCOT will provide dispatch instructions to qualified scheduling entities to maximize Resource deployment to increase Responsive Reserve levels on other Resources.
- Start "reliability must run units" available in the time frame of the Emergency. A "reliability must run unit" is a generation resource unit operated under the terms of an annual agreement with ERCOT that would not otherwise be operated except that they are necessary to provide voltage support, stability or management of localized transmission constraints under contingency criteria where market solutions do not exist.

Compensation for capacity or energy resources that ERCOT instructs for deployment due to a supply-related Emergency will be made according to the ERCOT protocols.

III. Ohio Provisions

§ 4935.03. Energy emergency rules; governor may declare emergency. (A) The public utilities commission shall adopt . . . rules in accordance with section 111.15 of the Revised Code, with the approval of the governor, defining various foreseen types and levels of energy emergency conditions for critical shortages or interruptions in the supply of electric power, natural gas, coal, or individual petroleum fuels and specifying appropriate measures to be taken at each level or for each type of energy emergency as necessary to protect the public health or safety or prevent unnecessary or avoidable damage to property. The rules . . . shall empower the governor to:

(3) Order, during a declared energy emergency, any electric light, natural gas or gas, or pipeline company; any supplier subject to certification under section 4928.08 or 4929.20 of the Revised Code; electric power or gas utility that is owned by a municipal corporation or not for profit; coal producer or supplier; electric power producer or marketer; or petroleum fuel producer, refiner, wholesale distributor, or retail dealer to sell electricity, gas, coal, or petroleum fuel in order to alleviate hardship, or if possible to acquire or produce emergency supplies to meet emergency needs;

(B) The governor may, after consultation with the chairperson of the commission, declare an energy emergency . . . at any time the governor finds that the health, safety, or welfare of the residents of this state or of one or more counties of this state is so imminently and substantially threatened by an energy shortage that immediate action of state government is necessary to prevent loss of life, protect the public health or safety, and prevent unnecessary or avoidable damage to property. ...

Ohio Administrative Code

4901:5-17-02. Governor's emergency powers. For any type or level of declared energy emergency, the governor shall have the power to:

(C) Order any electric light, natural gas, gas, or pipeline company, electric power or gas utility that is owned by a municipal corporation, or not-for-profit coal producer or supplier, or petroleum fuel producer, refiner, wholesale distributor, or retail dealer to sell electricity, gas, coal, or petroleum fuel in order to alleviate hardship, or if possible to acquire or produce emergency supplies to meet emergency needs.

4901:5-19-02. General provisions.

(J) When it is determined such action is appropriate, the governor may request the secretary of the United States department of energy to invoke section 202(C) of the Federal Power Act, 16 U.S.C. 824a (1935).

IV. Section 202 of Federal Power Act

(b) Whenever the Commission finds it necessary or appropriate in the public interest, it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons. However, the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the compensation or reimbursement reasonably due.

(c) Temporary connection and exchange of facilities during emergency

During any war or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, *the Commission shall have authority to require such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest.* If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the

Commission may prescribe the compensation or reimbursement which should be paid to or by any such party. (Emphasis added)

- Use of § 202(c) in the California electricity crisis

California Government Code § 8572: In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.

In connection with California restructuring legislation, FERC granted a series of requests to the buyers of plants formerly owned by utilities for the authorization to sell power in the wholesale markets at market-based rates. Certain plants with "locational market power" were placed under "reliability must run" contracts, subject to FERC jurisdiction, allowing the ISO to call upon them to run at cost-based prices if necessary for reliability.

On December 14, 2000, Energy Secretary Bill Richardson issued an order pursuant to Section 202(c) of the Federal Power Act to require generators and marketers to make power available to keep the lights on in California. The emergency order required that, if the California ISO certifies that there is an inadequate supply of electricity, certain electricity suppliers would be required to make power available to the ISO if they have power available in excess of the amount needed to satisfy service to firm customers. Those suppliers that have provided power to the California Power Exchange and the ISO over the last 30 days that have firm capacity available would be subject to the order.

Under the order, the ISO is required to provide notice to each supplier subject to the order in the amount and type of service requested by 9:00 p.m. EST on the day before the requested service. The ISO must, to the extent feasible, allocate the requests in proportion to the amount of each supplier's available power.

The order was extended and modified on January 5, 2001. The modified order prohibits the ISO from agreeing to a price for purchases under the order in excess of \$64/mwh. In the event the parties do not reach agreement on a price, FERC will determine the "just and reasonable" rate.