

Legal Options for Community Choice Aggregation in Virginia

Prepared for Virginia Clean Energy
By The Environmental and Regulatory Law Clinic at the University of Virginia School of Law¹

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EXECUTIVE SUMMARY

Virginia Clean Energy (<http://www.virginiaclean.energy/>) has asked the Environmental and Regulatory Law Clinic at the University of Virginia School of Law to investigate the legality of community choice aggregation (“CCA”) under existing Virginia law. Accordingly, this report seeks simply to evaluate the legality of CCAs generally under Virginia law, while at the same time identifying some possible legal hurdles to implementation of a CCA by a Virginia municipality.

Broadly speaking, there are three steps in providing electricity to customers: 1) generation; 2) transmission and distribution; and 3) retail consumption. Most retail customers in Virginia receive their electricity from an investor-owned electric utility company. Under regulation from the Virginia State Corporation Commission, an investor-owned utility manages all three steps of this process: generation, transmission, and sales. Community Choice Aggregation, also known as municipal aggregation,² provides one means for local governments to take charge of the sources of electricity generation that supply power to families and businesses within their borders. That is, under a CCA the local government assumes responsibility for steps 1 (generation) and 3 (sales), while the utility continues to manage step 2 (transmission and distribution).

Through a CCA, a local government has the opportunity to meet its residents’ preferences on the generation side—*e.g.*, increasing the percentage of wind and solar resources that are providing power to citizens. The locality also takes over pricing of electricity, and can respond to citizens’ requests to invest more in energy efficiency programs, for example.

² The terms “CCA” and “municipal aggregation” are used interchangeably throughout this report.

To be clear, this is a legal report, not a policy analysis. We have not compared the effectiveness of CCAs relative to other modes (*e.g.*, community solar programs, mandatory renewable portfolio standards, participation in the Regional Greenhouse Gas Initiative, etc.) for increasing renewable energy usage nor have we examined the costs and benefits of CCAs generally. We are not endorsing CCAs in general, or any particular CCA proposal.

Our research suggests that existing Virginia law allows for the development of a CCA program, so long as the CCA satisfies certain restrictions identified in the Code. The most relevant provisions leading us to this conclusion are Va. Code § 56-577 (A)(3) and § 56-589, which support a finding that a CCA can be developed as a matter of right. Opponents of a proposed CCA might argue Va. Code § 56-577 (A)(4) and (A)(5) provide various impediments to the development of municipal aggregation, and could argue that subdivision (A)(4) requires a finding by the State Corporation Commission (“the Commission”) that a CCA is in the “public interest” and would not adversely affect the incumbent utility or customers who are not part of the CCA.

The question over the applicability of subdivisions (A)(4) and (A)(5) is critical to the analysis. Under subdivision (A)(4), the Commission appears to have fairly broad discretion to approve or reject a proposal on public interest grounds.

If the subdivisions do not apply—which we think is the correct analysis—then the Commission’s role is far more limited. To be clear, the Clinic’s view is that subdivisions (A)(4) and (A)(5) are inapplicable in the CCA context under Va. Code § 56-589. Community choice aggregation is generally available to municipalities *by right*.

This legal right notwithstanding, there are some important limitations imposed by Va. Code § 56-577(A)(3), and processes under § 56-589, that must be followed before a CCA can or should be established. This report briefly addresses these limitations and processes as well.

Each municipality should evaluate, with its own counsel, the potential benefits and risks with community choice aggregation. The Environmental and Regulatory Law Clinic at the University of Virginia is not aware of any municipality in the Commonwealth that has attempted to create a CCA program under this statute.

Indeed, the State Corporation Commission authorized pilot programs for municipal aggregation in 2003, but no locality ever took advantage of the opportunity. *See* Final Order, Application of Va. Elec. & Power Co. For Approval of Retail Access Pilot Programs, PUE-2003-00118 (Sept. 10, 2003). Six localities (the cities of Fairfax, Charlottesville, and Hampton, and the counties of York, Chesterfield, and Charles City) went so far as to participate in a feasibility study, but never made the leap to establishing and implementing a CCA program. *See First Annual Report of Dominion Virginia Power on Status of the Retail Access Pilot Programs*, PUE-2003-00118, at 12 (May 25, 2005); *Second Annual Report of Dominion Virginia Power on Status of the Retail Access Pilot Programs*, PUE-2003-00118, at 1 (May 25, 2006).

Thus, although CCAs have been established in other states, the concept remains uncharted territory in Virginia.

DISCUSSION

I. Introduction.

Virginia Code § 56-589 (A) articulates three options a municipality might pursue to design a CCA: (1) on behalf of customers within its jurisdiction; (2) on behalf of



itself for its governmental buildings and facilities; and (3) on behalf of itself and other municipalities for their governmental buildings and facilities, provided that the several municipalities are “are acting jointly” to negotiate power purchases.

The analysis in this report focuses on the first option, which would allow a municipality in Virginia to aggregate the energy and demand requirements of the “residential, commercial, and industrial retail customers within its boundaries on an opt-in or opt-out basis.” *See* Va. Code § 56-589 (A)(1). Although there is a strong argument that the Virginia Code gives municipalities a statutory right to enter into a CCA, our analysis also considers whether Va. Code § 56-577 (A)(4) could apply and evaluates the impact of recent State Corporation decisions in similar cases filed under that section.

³ Photo credit: U.S. Coast Guard Academy / Cory J. Mendenhall (June 25, 2013) (identified as public domain at <https://www.flickr.com/photos/uscoastguardacademy/9133269157/in/photolist-eV5oHT-eV5p2k-eV5oDv-eV5pfZ-eVgMX5-eV5p6X-eVgNcN-eVgN8y>).

In addition to the legal analysis provided below, other federal, state, or municipal laws not examined here could provide a hurdle to CCA implementation. Other laws may place restrictions on municipal contracting power and debt limitations, for example. *See* NAT'L RENEWABLE ENERGY LAB., POWER PURCHASE AGREEMENT CHECKLIST FOR STATE AND LOCAL GOVERNMENTS, at 11 (Oct. 2009), at <https://www.nrel.gov/docs/fy10osti/46668.pdf>. A cursory review did not identify any particular barrier to CCA formation. Still, it will be important to do more research when more is known about an individual proposed CCA project.

II. Existing Virginia law likely allows for “by right” development of a CCA.

Virginia continues to have a regulated electricity market, which allows incumbent electric utilities to maintain monopoly rights over access to customers in their service territories. For individual, retail customers of investor-owned electric utilities, Va. Code § 56-577 provides three exemptions to this monopoly right.⁴

Another provision of the Code, § 56-589, gives municipalities wishing to aggregate their residents' electricity demands the ability to take advantage of the first of those three exemptions. Specifically, subdivision (A) of § 56-589 permits municipalities⁵ and other political subdivisions of the Commonwealth to aggregate their electric energy demand requirements for the purposes of establishing a municipal aggregation program.

⁴ First, § 56-577 (A)(3) of the Code includes a retail choice option for customers with peak demand over 5 megawatts, subject to certain restrictions. Second, § 56-577 (A)(4) of the Code allows one or more nonresidential customers to aggregate demand to meet the 5 megawatt threshold subject to Commission approval. Third, § 56-577 (A)(5) of the Code allows individuals the option to buy 100% of their electric energy needs from a Competitive Service Provider delivering renewable energy if the utility does not offer an approved 100% renewable energy tariff.

⁵ Virginia law defines “municipalities” to include counties, cities, and towns. *See* Va. Code § 56-589 (A).

The Virginia General Assembly explicitly provided that § 56-589 would be implemented “[s]ubject to the provisions of subdivision A 3 of § 56-577.” Subdivision (A)(3), in turn, references that its restrictions are “[s]ubject to the provisions of subdivisions 4 and 5” of the same Code provision. Thus, there is a question as to whether this internal cross-reference has the effect of rolling all of these subdivisions into Va. Code § 56-589, even though § 56-589 makes no reference itself to “subdivisions 4 and 5” of § 56-577.

In sum, there may be an unresolved question as to whether §§ 56-577 (A)(4) and (A)(5) could be “daisy-chained” into the municipal aggregation statute, which would add additional barriers to the development of a CCA program. To our knowledge, no local government has promulgated a municipal aggregation program, meaning that there is little evidence on how the Commission will interpret the municipal aggregation statute.

A. The Likely Inapplicability of § 56-577 (A)(4).

As explained above, Va. Code § 56-577 (A)(3) begins by stating that it is “[s]ubject to the provisions of subdivisions 4 and 5.” Dominion Energy has already argued that the “subject to” language linked the various provisions, such that “large customers must comply with the notice requirement in Section (A)(3), even if they purchase electricity from a CSP under Section (A)(5).” *See Va. Elec. and Power Co. (“VEPCO”) v. State Corp. Comm’n*, 810 S.E.2d 880, 885 (Va. 2018). The Supreme Court of Virginia, however, explicitly rejected this argument, finding that the provisions stand largely alone. “There is no notice requirement for purchases under Section (A)(5), and no language that incorporates the notice provision from (A)(3) into (A)(5).” *Id.*

Thus, even if a utility attempted to block municipal aggregation by arguing that the restrictions of subdivision (A)(4) are incorporated by reference into the instructions of § 56-589, the Supreme Court is likely to reject the argument, citing its decision in *VEPCO*.

Moreover, attempting to apply the requirements of § 56-577 (A)(4) to CCAs would lead to an unlawful and absurd result. *See Boyton v. Kilgore*, 623 S.E.2d 922, 926 (Va. 2006) (courts apply the plain language of a statute unless ... applying the plain language would lead to an absurd result”). Subdivision (A)(4) of Va. Code § 56-577 states that only *nonresidential* customers may aggregate load under that particular provision. If subdivision (A)(4) were applied to Va. Code § 56-589, then municipalities would be barred from aggregating one class of customer (residential customers) that the Code specifically identifies for inclusion. *See* Va. Code § 56-589(A)(1).

6

A more logical interpretation of the statute finds that Va. Code § 56-577(A)(3) is explicitly incorporated into Va. Code § 56-589, to the exclusion of subdivision (A)(4) and all other



⁶ Photo credit: Arlington National Cemetery, U.S. Army / Elizabeth Fraser (April 18, 2018) (identified as public domain at <https://www.flickr.com/photos/arlingtonnatl/27170613737/in/photolist-HoYuRx-279c2B5-26rAsMY-TMQK7W-UrqNGA-TMQHZ5-2gjjT2n-2gd5CV1-25jw4oc-2gQKr2w-2gQKgCS-ZKE2yc-2bqpsVJ-2hwQC3X-2gfH9w5-S1tjV6-2hGZRbf-2gFSd6N-2gjk7Cf-2goLLgh-2hwUqMX-2g2CqCs-2gjkr9v-ZFkGBE-2cJwFDB-2fpccPC-2gjnqzL-HSggjX-2gjkQFZ-PNfE3s-2gjnPdL-2gjn4RW-2gjmwtk-2gd5eCJ-2ge1bDL-2etwNBw-2gjnMd-QAH3uT-ke6Eva-22Fe9iy-2gHn82e-2hwR5bP-2aPsH7Q-TgLj9h-2fhrZJg-d3fG93-2g8ebWt-2diaGFd-Rs1DWb-2diaKGo>).

provisions in Va. Code § 56-577. This reading accords with the common-law doctrine of *expressio unius est exclusio alterius*, which “provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.” *See Turner v. Sheldon D. Wexler, D.P.M. P.C.*, 244 Va. 124, 128 (1992); *see also Miller & Rhoads Building, L.L.C. v. City of Richmond*, 292 Va. 537, 543-44 (2016) (“In interpreting statutory language, we have consistently applied the time-honored principle *expressio unius est exclusio alterius*,’ because this maxim ‘recognizes the competence of the legislature to choose its words with care.’ ... Stated another way, ‘the mention of specific items in a statute implies that all items omitted were not intended to be included.’”) (internal citations omitted).

This reading is buttressed by the “presumption that revised or recodified statutes are not substantively changed unless a contrary intent plainly appears in the revised statute.” *State Farm Mut. Auto. Ins. Co. v. Major*, 389 S.E.2d 307, 309 (Va. 1990). Virginia Code § 56-589 was enacted in 1999 and gave municipalities the ability aggregate by right with no conditions other than that it be approved by majority vote of the governing body of the locality. *See Virginia Electric Utility Restructuring Act*, 1999 Virginia Laws Ch. 411 (S.B. 1269). The reference to § 56-577 (A)(3) was added when § 56-577 was re-codified in 2007 as part of Virginia’s electric utility reregulation bill. *See 2007 Virginia Laws Ch. 888 (H.B. 3068)*, *2007 Virginia Laws Ch. 933 (S.B. 1416)*.

That revision merely added the load threshold and notice requirements details of § 56-577 (A)(3) to community choice aggregation. It would be remarkable to weaken community choice aggregation — moving from the historic, “by right” option for localities to requiring a “public interest” finding from the State Corporation Commission — without an explicit statement from

the General Assembly. Surely, such a substantive change would require a plainer statement than incorporation of (A)(4) by implication. Further cementing this interpretation is the widespread acceptance of the fact that subdivision (A)(3) allows for applicable customers to create a 100% renewable energy plan for aggregated customers, notwithstanding a separate, 100% renewable energy option for retail customers under subdivision (A)(5). Dominion Energy has acknowledged that applicable customers under subdivision (A)(3) may create a 100% renewable power option from sources on the open market.

In arguments before the Supreme Court of Virginia, the utility company affirmed, “The largest customers have a right to purchase any energy under (A)(3), whether it’s renewable or not, and all parties agree on that.” See Recording of Oral Argument, *Va. Elec. And Power Co. v. State Corp. Comm’n*, at 02:19, available at http://www.courts.state.va.us/courts/scv/oral_arguments/2018/feb/171151.MP3. The Supreme Court acknowledged this observation, stating, “Section (A)(3) allows certain large customers whose demand exceeds five megawatts to purchase electricity from a [competitive service provider], regardless whether the electricity is produced with renewable or nonrenewable energy.” *Va. Elec. And Power Co. v. State Corp. Comm’n*, 810 S.E.2d 880, 884 (Va. 2018).

In short, the simplest way to read the statute would be to recognize that the General Assembly made an explicit decision to include within the language of Va. Code § 56-589 a specific reference to § 56-577 (A)(3), but no reference to subdivisions (A)(4) or (A)(5). Thus, the requirement for a public interest finding in subdivision (A)(4) is not part of the approval process for any community choice aggregation proposal under Va. Code § 56-589.

B. The Unlikely but Potential Applicability of § 56-577 (A)(4).

Notwithstanding the above analysis, if § 56-577 (A)(4) were found to apply to municipal aggregation, then a locality would have to petition the State Corporation Commission for permission to aggregate its residents' electricity demands. An approval by the Commission would require a finding that: 1) neither the incumbent utility nor non-aggregated customers will be adversely affected in a manner contrary to the public interest; and 2) approval of such petition is consistent with the public interest. *See Va. Code § 56-577 (A)(4).*

To date, the Commission has decided three customer aggregation petitions under Va. Code § 56-577 (A)(4).⁷ In *Petition of Reynolds Group Holdings Inc.*, a small group of affiliated industrial customers successfully petitioned the Commission to aggregate six accounts for a total of 10.12 megawatts in Dominion Energy's service territory. *See Reynolds*, Case No. PUR-2017-00109, at 3 (Opinion May 16, 2018). The approval in *Reynolds* was based on a determination that this "first and limited aggregation request [was approved] in order to gain initial, measured experience related to implementing this statutory provision." *Id.* at 4.

By contrast, the Commission denied requests by Wal-Mart Stores to aggregate a larger number of commercial accounts in both Dominion and Appalachian Power service territories. *See Petitions of Wal-Mart Stores, LP and Sam's East Inc.*, PUR-2017-00174 and PUR-2017-00173, (Final Order Feb. 25, 2019). Wal-Mart Stores had sought to aggregate 120 customers in Dominion's

⁷ For purposes of this report, the two petitions filed by Wal-Mart Stores were evaluated as a single petition, as they were decided simultaneously and under similar conditions. The third petition filed by Costco (PUR-2018-00088) was not evaluated for this report. The Commission's analysis was similar to that in the Wal-Mart petitions.

service territory for a total 70.52 megawatts of capacity, and 44 customers in Appalachian Power’s service territory for 20.57 megawatts. *Id.* The Commission reasoned that aggregated retail choice under § 56-577 (A)(4) was *not* a right of customers, but remained subject to the Commission’s discretion in determining what is in the public interest. *See, e.g., Petitions of Wal-Mart Stores East, LP and Sam’s East, Inc.*, PUR-2017-00173 and -00174, at 7 (Final Order Feb. 25, 2019).

In denying the petition, the Commission focused on the effect that cost-shifting would have on non-aggregated, non-participating customers.

8



As aggregated customers left a utility’s system, the remaining customers left behind might be forced to pay higher electricity rates to absorb the fixed costs of utility infrastructure spread over fewer customers. Thus, the Commission found that “approval of aggregated retail choice

for Walmart in Appalachian’s service territory could shift approximately \$4 million of costs to remaining customers over the next ten years. For Dominion, aggregated retail choice for Walmart could shift up to \$65 million of costs to remaining customers over that period.” *See Petitions of Wal-Mart Stores East, LP and Sam’s East, Inc.*, PUR-2017-00173 and -00174, at 9 (Final Order Feb. 25, 2019).

⁸ Photo credit: U.S. Department of Energy / Gary Norton (May 31, 2010) (identified as public domain at <https://www.flickr.com/photos/iip-photo-archive/38621436711/in/photolist-PE7wuh-21QQXzR-oNTMdT-xc6oWs>).

Further contrasting with the *Reynolds* proceeding was the scale of the aggregation at issue in *Wal-Mart*. Whereas customer aggregation in *Reynolds* represented less than one-tenth of one percent (0.06%) of Dominion's peak demand, both *Wal-Mart* petitions would have aggregated several times more power within Dominion's (0.40%) and Appalachian's (0.36%) service territories. See Staff Report on *Petition of Reynolds Group Holdings, Inc.*, PUR-2017-00109, at 7 (filed Nov. 21, 2017); Staff Report on *Petition of Wal-Mart Stores East, LP and Sam's East, Inc.*, PUR-2017-00173, at 7 (filed Mar. 29, 2018) (Dominion proceeding); Staff Report on *Petition of Wal-Mart Stores East, LP and Sam's East, Inc.*, PUR-2017-00174, at 5 (filed Apr. 13, 2018) (Appalachian proceeding). In all, for § 56-577 (A)(4) petitions, the Commission has indicated that it is focused on the external, economic harm to non-aggregated customers, and will only approve of customer aggregation in limited circumstances.

There is, of course, a critical difference between community choice aggregation under Va. Code § 56-589 and large, commercial customer aggregation under Va. Code § 56-577(A)(4). A primary concern in the *Wal-Mart* cases was that only one class of customer was afforded the option of aggregation. Non-commercial customers would not have the choice to pick a different energy supplier. The Commission was troubled that aggregating one class of customers to the exclusion of others might adversely affect non-participating customers, who would lack any option for joining the approved aggregation scheme. This is a critical and fundamental distinction between industrial/commercial aggregation and community choice aggregation. Under Va. Code § 56-589, *any* customer class – residential, commercial, industrial – can choose to participate in a community aggregation scheme so long as the municipality votes to create one.

C. Important Limitations Within § 56-577 (A)(3).

Assuming that §§ 56-577 (A)(4) and (A)(5) are inapplicable to CCAs, there are still several requirements that must be met to adhere with subdivision (A)(3). Most obviously, Va. Code § 56-577 (A)(3) requires a demand of at least 5 megawatts in the previous calendar year to qualify. To meet this threshold, § 56-589 (A) permits municipalities to aggregate the electric load of: 1) residential, commercial, and industrial retail customers within its boundaries on an opt-in or opt-out basis; 2) its governmental buildings, facilities, and any other governmental operations requiring the consumptions of electric energy; or 3) its governmental buildings, facilities and any other governmental operations requiring the consumption of electric energy with that of additional municipalities or other political subdivisions. For large municipalities like Arlington County or the City of Alexandria, this 5 megawatt threshold might be easy to meet.

In addition to having to meet a minimum demand threshold, § 56-577 (A)(3) requires that a customer *cannot* have had a peak demand exceeding one percent of the incumbent utility’s peak load during the previous calendar year unless “such customer had noncoincident peak demand in excess of 90 megawatts in calendar year 2006 or any year thereafter.” The noncoincident peak demand is a generally accepted industry term referring to that customer’s peak demand during the stated timeframe. That stands in contrast to ‘coincident peak’ which would be the utility’s peak load during the same timeframe. Again, the 90 megawatt requirement might be fairly easy to clear for municipalities the size of Alexandria and Arlington,⁹ which would then eliminate the one percent cap imposed by subdivision (A)(3).

⁹ Dominion estimates that 1,600 megawatts would be enough energy to power about 400,000 households. That would mean 90 megawatts would be sufficient to power about 22,500 households. *See* DOMINION ENERGY’S SOLAR ENERGY REPORT TO THE GOVERNOR, CHAIRMEN OF THE HOUSE AND SENATE COMMITTEES ON COMMERCE AND LABOR, AND STATE CORPORATION COMMISSION, at 4 (Nov. 1, 2018). By way of comparison, the U.S. Census

Of course, each municipality should verify its energy and demand requirements to determine applicability of these thresholds before pursuing a CCA. To be clear, unless the 90-megawatt exemption applies, municipal aggregation is available only for those localities that fall within a window of having more than 5 megawatts of aggregated demand but accounting for less than 1% of the utility's total system peak demand.

Lastly, and perhaps most importantly, § 56-577 (A)(3)(c) requires a five year written notice period before the customer may return to the incumbent utility for any reason. This requirement may be waived by the Commission by a finding that it would not adversely impact the incumbent utility or its customers, including a consideration of the cumulative impact of previous waivers. The Commission would also be directed to prescribe a stay period to remain with the incumbent utility after returning. These requirements likely only apply at the programmatic level (*e.g.*, to the municipality as a whole and not to individual retail customers within that municipality, who may participate “on an opt-in or opt-out basis” pursuant to Va. Code § 56-589 (A)(1)). Nevertheless, this limitations period could prove onerous and should be carefully considered before a municipality decides to form a CCA.

If the incumbent utility has elected the Fixed Resource Requirement alternative as a Load Serving Entity in PJM as of February 1, 2019 then the notice period for returning to the incumbent utility would be reduced to three years but certain additional fees could apply on an ongoing basis. *See*

bureau estimates that Arlington contains over 102,000 households and Alexandria contains over 68,000 households. *See* U.S. Census, *QuickFacts: Arlington County, Virginia* (2013-2017 data), at <https://www.census.gov/quickfacts/arlingtoncountyvirginia>; U.S. Census, *QuickFacts: Alexandria City, Virginia* (2013-2017 data), at <https://www.census.gov/quickfacts/fact/table/alexandriacityvirginiacounty/INC110217>.

Va. Code § 56-577 (A)(6). It does not appear that this provision applies to Dominion Energy customers, but any future efforts to form a CCA in Appalachian Power territory could be subject to that restriction. *Critically, a municipality should evaluate, with its own counsel, the potential of each of these provisions, along with the risks, benefits, and overall impacts of municipal aggregation, for the municipality's individual residents.*

10

The Environmental and Regulatory Law Clinic at the University of Virginia is not aware of any municipality in the Commonwealth that has attempted to create a CCA program under this statute. *See Second Annual Report of Dominion Virginia Power on Status of*



the Retail Access Pilot Programs, PUE-2003-00118, at 1 (May 25, 2006) (noting that no customers participated in an earlier pilot program). Accordingly, it remains (legally) uncharted territory to some degree.

Municipalities should research how these requirements might apply to individual customers that choose to opt-out of a CCA after initially joining it. California, for example, explicitly allows incumbent utilities to collect a reentry fee that represents the actual cost of reentry for an individual customer returning from a CCA upon approval of the commission. *See CA PUB. UTIL. § 366.2.* It

¹⁰ Photo credit: Massachusetts Department of Transportation (Aug. 16, 2013) (identified as public domain at <https://www.flickr.com/photos/massdot/11353930316/in/photolist-iiiRVf-ijj4gQ-2b3Zk9S-SaUfc9-25bGX4G-umnYLC-Xinjz6-22mebyQ-2148c5z-nsqNvB-NYWcEZ-5az2Wc-2bNgPG8>).

is thus not inconceivable that the Commission in Virginia would use its broad power under § 56-577 (A)(3) to evaluate the reentry of individual customers in a similar fashion.

III. Procedures for Establishing a CCA Under Existing Virginia Law.

To establish municipal aggregation in the Commonwealth, Va. Code § 56-589 requires that the municipality or other political subdivision agree to enter into a municipal aggregation program through appropriate political means, including authorization by a majority vote of the relevant governing body. In deciding whether to participate in a municipal aggregation program, the local government must first decide the manner in which it will aggregate electric energy for the purposes of meeting the § 56-577 (A)(3) threshold requirement, including how to manage the opt-in/out-out requirement of the law. If the municipality is seeking to aggregate the load of its residents and businesses, not just the load of the government itself, then the municipality must register as an “aggregator” under Va Code § 56-588.

“Aggregators” is a defined term under § 56-576, which includes actors that offer to purchase and arrange for the electric supply service for two or more retail customers not under common ownership. *See also* 20 Va. Admin. Code § 5-312-10 (similarly defining the term “aggregators”). When applying for an aggregator license, the Commission requires the license application to be filed in accordance with the Commission’s Rules of Practice and Procedure and Rules Governing Retail Access to Competitive Energy Services. *See* 20 Va. Admin. Code § 5-312-40 (confirming the process that localities must follow to establish a CCA project under Va. Code § 56-589 (A)(1)). *See also* Va. Code § 56-588.

The incumbent electric utility will also have its own registration requirements for a potential aggregator to satisfy. Dominion Energy, among other obligations, requires potential aggregators to complete and submit an Aggregator Agreement. *See* Virginia Electric and Power Company, AGGREGATOR AGREEMENT (Drafted Sept. 9, 2019), *available at* <https://www.dominionenergy.com/library/domcom/media/suppliers/energy-suppliers/csp-aggregator-agreement.pdf>. Aggregators will again need to consult their own counsel to review these agreements and forms to ensure fair, efficient, and equitable access to competition.

A less ambitious proposal would be for a local government, under Va. Code §56-589 (A)(2) or (A)(3), to aggregate the electric supply of its governmental buildings, facilities, and any other governmental operations, either on its one or in collaboration with another locality. A benefit of this milder approach would be ease of initiation, since “[a]ggregation pursuant to th[ese] subdivision[s] shall not require licensure pursuant to § 56-588.” *See* Va. Code § 56-589(A)(2) & (3). It would also simplify management of the CCA, as residential customers and private businesses would be excluded. Instead, those customers would continue to receive service directly from the incumbent electric utility, with no option to join the local CCA.

Under *any* approach under Va. Code § 56-589 — whether for municipal aggregation of all customers or municipal aggregation of government-owned meters only — electricity must be must be purchased from the incumbent utility or a competitive service provider licensed by the State Corporation Commission. Licensure of a supplier is done in accordance with Va. Code § 56-587 and contains many of the same requirements as for those of an aggregator, including demonstration of financial responsibility. The Commission maintains a list of licensed suppliers on its website.

See Virginia State Corporation Commission, COMPETITIVE SERVICE PROVIDERS AND AGGREGATORS, available at <https://www.scc.virginia.gov/power/compsup.aspx>.

Virginia Code § 56-589 is silent as to whether a CCA may be authorized to offer multiple “products” (e.g., portfolios with varying degrees of clean and/or renewable energy), or a single product (e.g., a 100 percent renewable energy option). While offering an array of options would likely complicate management of the CCA for the locality and its aggregator, it could also increase customer participation. See Irwin Kim, ROADMAP TO 100: HOW LOCAL COMMUNITIES CAN ACHIEVE 100% RENEWABLE ELECTRICITY AMBITIONS, at 42 (2019). Zero-carbon options could prove especially popular given that Dominion Energy has proposed a 100% renewable energy tariff in its service territory that would include electricity from several carbon-emitting biomass units and also from the Virginia City Hybrid Energy Center, a coal-fired power plant in Wise County, Virginia. See Rebuttal Testimony of Dominion Energy Witness Robert J. Trexler, Case No. PUR-2019-00094, at 6, lines 9-17 (filed Nov. 12, 2019).¹¹

IV. Conclusion.

This report provides a general roadmap for establishing a CCA in Virginia, and attempts to identify some of the potential speedbumps that might be encountered along the way. Municipal aggregation is a statutorily provided option within the Commonwealth. As explained in this report, that option should be considered “by right” for municipalities. Provided a local government meets the statutorily thresholds, the State Corporation Commission *must* approve a CCA proposal.

¹¹ The Wise County plant is treated by the utility as “renewable” because it is co-fired with a small percentage of biomass, and Va. Code § 56-576 provides, “Renewable energy shall also include the proportion of the thermal or electric energy from a facility that results from the co-firing of biomass.”

The appeal of a CCA is easy to see. It has the potential to give local governments far greater control over the generation resources providing electricity to its residents, along with more control over the cost of that electricity. Given the limited zero-carbon, renewable energy options with the Dominion Energy system, an independently-operated CCA could allow customers access to a popular alternative.

That said, a locality should proceed very cautiously, especially considering the restrictions on re-establishing service from an incumbent utility should a given CCA prove unsuccessful. Most notably, Virginia law generally imposes a five-year notice obligation before a locality may return to the incumbent utility for any reason. A municipality considering a CCA should therefore carefully consider the costs and benefits of all available alternatives for promoting renewable energy and customer choice.

12



¹² Photo credit: Matt Popovich (May 9, 2015) (identified as public domain at <https://www.flickr.com/photos/mattpopovich/17253647983/>).