

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND**

**COMAR 20.53
Competitive Electric Supply**

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Administrative Docket RM17

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**Comments of the Office of People’s Counsel
Regarding Proposed Regulations,
COMAR Sections 20.53.01 and 20.53.03 - .07**

On November 13, 2007, the Public Service Commission issued a Notice of Rulemaking Session in the above-referenced Administrative Docket. The Notice advised electric companies, licensed suppliers and interested persons that the Commission will consider approving proposed regulations, COMAR Sections 20.53.01 and 20.53.03 - .07, for publication in the Maryland Register for notice and comment in a rulemaking sessions scheduled for November 28, 2007. The Office of People’s Counsel (OPC) hereby submits its written comments regarding the proposed regulations. OPC urges the Commission to delay submission of the proposed regulations for publication until after the Commission submits its initial report to the General Assembly, as required by Senate Bill 400, and after it renders its decision in PSC Case No. 9117. Once these core issues have been addressed, the PSC could then decide whether to consider changes to the competitive supply regulations in Administrative Docket RM17.

Alternatively, OPC urges the Commission not to approve COMAR Sections 20.53.05.03(d) (Utility Consolidated Billing), 20.53.07.06 (Residential Customer Protection – Termination), and 20.53.07.08(b) (4) (Supplier Contracts –Telephone

Contracts) for publication, as these proposed regulations do not provide benefits to, and may harm, residential ratepayers.

I. Procedural Background

On July 1, 2005, the Commission issued a Notice soliciting comments on draft proposed regulations prepared by the Commission Staff, which were intended to replace the existing competitive supplier regulations, including Subtitle 53 of Title 20, COMAR.¹ The Commission approved proposed regulations for publication on August 22, 2006,² and on September 29, 2006, the proposed regulations were published in the Maryland Register, Vol. 33, Issue 20, pp. 1626-1632. By letter dated November 9, 2006, the Maryland General Assembly, Joint Committee on Administrative, Executive, and Legislative Review (“AELR”) requested that the Commission delay final adoption of the proposed regulations in COMAR 20.53.³ On November 9, 2007 notice was published in the Maryland Register, Vol. 34, Issue 23, p. 2028, that the Commission’s proposal to repeal existing Subtitle 53 in its entirety and adopt new proposed regulations was withdrawn by operation of law, since more than one year had passed since publication of the proposed regulations.⁴ On November 13, 2007 the Commission noticed its intention to consider the originally proposed regulations, with the exception of COMAR 20.53.02.01 -.03, Customer Lists, for re-publication at a Rulemaking Session on November 28, 2007.

¹ Commission Administrative Docket RM17 (RM17), Docket Item 1, Mail Log # 97924.

² RM17, Docket Item 36, Mail Log # 103217.

³ RM17, Docket Item 49. Mail Log # 103764.

⁴ RM17, Docket Item 53, Mail Log # 108334.

II. Discussion

A. The Commission Should Delay the Publication of the Proposed Regulations

The Commission has issued a notice of its intent to consider re-publication of the proposed regulations, originally published in the Maryland Register on September 26, 2006, in response to the formal notice of withdrawal of the regulations by operation of law. At a minimum, OPC urges the Commission to delay consideration of re-publication of these regulations until after the following have taken place: (1) issuance of the Commission's report to the General Assembly on December 1, 2007, required by Senate Bill 400 (Report), and consideration of the response of stakeholders and the General Assembly to the Report; and (2) issuance of a final decision in the pending proceeding, *In the Matter of the Investigation of the Investor-Owned Companies' Standard Offer Service for Residential and Small Commercial Customers*, Case No. 9117. To do otherwise is premature. Both the Commission's interim Report and the final decision in Case No. 9117 will address issues of key concern to Maryland residential ratepayers, and to the General Assembly. They will impact the public policy discussion about the state of electric restructuring in Maryland as it relates to residential and small customers, and whether changes to the retail competition model should be made on behalf of those customers. The Commission currently has regulations relating to the conduct of electricity suppliers. There is no need to consider further changes to those regulations until the core issues are addressed.

Senate Bill 400⁵ required this Commission to establish new proceedings to review and evaluate issues identified in Senate Bill 1,⁶ as modified by Senate Bill 400, including

⁵ Chapter 549, Acts 2007.

⁶ Chapter 5 and 7, Acts 2006, Sp. Sess.

the status of deregulation in Maryland and the procurement of electricity supply by investor-owned utilities for residential and small commercial customers. These issues were considered previously by the Public Service Commission in proceedings initiated in 2006.⁷ While the Commission is required to include a review of any previous order, and may review the record in any open proceedings established pursuant to Senate Bill 1, the General Assembly clearly envisioned a “fresh look” at these issues by the Commission. The Commission established new proceedings to consider procurement, generation and transmission issues, as well as energy efficiency, conservation and low-income issues.⁸ and retained a consultant, pursuant to a Request for Proposal issued on June 20, 2007,⁹ to prepare a report on several issues, including the status of deregulation in Maryland, and options and alternatives fore reregulation of the retail electric industry in Maryland.

The proposed regulations that the Commission is set to consider for re-publication were developed and published during a period of customer and legislative angst regarding

⁷ See, for example, *In the Matter of the Optimal Structure of the Electric Industry in Maryland* (Case No. 9063)(additional proceedings pursuant to the Commission’s August 3, 2006 Notice); *In the Matter of the Competitive Selection of Electric Supplier/Standard Offer Default Service for Investor-Owned Small Commercial Customers*; and *for the Potomac Edison Company d/b/a Allegheny Power’s Delmarva Power and Light Company’s and Potomac Electric Power Company’s Residential Customers* (Case No. 9064); *In the Matter of the Commission’s Investigation Required by Section 5, 2006, 2006 Maryland Laws, 1st Special Session, Public Service Commission – Electric Industry Restructuring* (Case No. 9073); *In the Matter of the Investigation Required by Section 11, 2006 Maryland Laws, 1st Special Session, Public Service Commission – Electric Industry Restructuring* (Case No. 9074).

⁸ *In the Matter of Baltimore Gas and Electric Company’s Proposal for Implementation of a Rate Stabilization Plan Pursuant to Section 7-548 of the Public Utility Companies Article and the Commission’s Inquiry into Factors Impacting Wholesale Electric Prices* (Case No. 9099); *In the Matter of the Commission’s Investigation of Advanced Metering Technical Standards, Demand Side Management (DSM) Cost Effectiveness Tools, DSM Competitive Neutrality and Recovery of Costs of Advanced Meters and DSM Programs* (Case No. 9111); *In the Matter of the Commission’s Investigation of Investor-Owned Electric Companies’ Standard Offer Service for Residential and Small Commercial Customers in Maryland* (Case No. 9117). The Commission also conducted additional proceedings in the ongoing Electric Universal Service Program case, Case No. 8903, and established a Public Conference on the capacity and reliability of generation, *In the Matter of the Commission’s Maryland Electricity Planning Conference*, PC-9, including the conduct of public hearings on July 27 and 28, 2007 and a Work Group session on November 15, 2007.

⁹ *Request for Proposal for Expert Consultant Services Concerning Maryland Electric Industry Evaluation for the Maryland Public Service Commission*, PSC No. 01-01-08.

the state of retail competition in Maryland, and what it has brought to Maryland's residential customers. Over 97% of Maryland residential customers continue to receive electricity supply service from their investor-owned utilities.¹⁰ The General Assembly has made abundantly clear, first through Senate Bill 1, and then again, through Senate Bill 400, that it is troubled by the consequences for residential customers of the Electric Customer Choice and Competition Act of 1999,¹¹ and wants a fresh look at the existing state of deregulation, and whether the electricity needs of small customers are better addressed under a different regulatory model.

The Commission's 2006 publication of proposed competitive supplier regulations involved a repeal of the existing consumer protection regulations applicable to electricity and gas suppliers, and the proposed adoption of new regulations. The withdrawal of the notice therefore means that the existing regulations remain in effect. Given the significant core public policy issues at stake, to be addressed in the Commission's interim report to the General Assembly, it makes little sense for this Commission, which decided to re-assess many of the previous rulings of the Commission pertaining to retail competition for residential consumers, to now publish a set of proposed regulations from those prior proceedings, when the Commission has not yet provided any report, including data, assessments and possibly recommendations, with regard to retail competition in Maryland.

Furthermore, in Case No. 9117, the Commission is considering a proposal of a competitive supplier, Direct Energy, for a low-income aggregation program, that would require the mandatory purchase of all residential accounts receivables by investor-owned

¹⁰ See, Electric Choice Enrollment Report for the period ending October 2007, prepared by the Staff of the Commission, at www.psc.state.md.us.

¹¹ Chapters 3 and 4, Acts 1999.

utilities. The docket is still open in that proceeding, for possible additional evidentiary proceedings, and the filing of briefs and/or oral argument. It would be premature, at best, for the Commission to promulgate regulations requiring such purchase of receivables prior to issuance of a final decision in that case.

For residential customers, very little has changed since June 2006 in terms of the numbers of Maryland customers served by competitive suppliers despite the removal of rate caps for BGE customers. The publication, and ultimately the possible adoption, of these regulations, do not provide any benefits to the residential ratepayers, and as discussed below, may harm them. Under such circumstances, the Commission should not move forward with publication of the regulations at this time.

B. The Commission Should Not Approve the Publication of Proposed Regulations Requiring the Purchase of Accounts Receivable by Investor-Owned Utilities

The Commission is considering the approval of certain regulations pertaining to the purchase of accounts receivable by investor-owned utilities, and the extension of the extraordinary self-help remedy of service termination to unpaid bills originating with competitive electricity suppliers, as set forth in proposed COMAR 20.53.05.03 and 20.53.07.06. People's Counsel strongly objects to both the required purchase of receivables from these suppliers, and to the use of service termination, and the threat thereof, as bill collection tools, and urges this Commission to decline their approval. These proposed regulations reflect the views of competitive suppliers, asserted since the early days of deregulation, that these "tools" are needed by competitive suppliers to

provide service to residential consumers in Maryland. However, these tools benefit competitive suppliers, not ratepayers.

Proposed COMAR 20.53.05.03 – Utility Consolidated Billing provides that if a utility is a consolidated biller, and presents residential consumers with a consolidated bill that contains both utility and competitive supplier charges (which is done in all instances at this time), the utility must either purchase the receivables from the competitive supplier or pro-rate the consumer’s payments towards the utility and supplier charges. In addition, proposed COMAR 20.53.07.06 provides that when a utility purchases receivables from a competitive supplier, the receivables are deemed “utility charges,” thereby subjecting residential consumers to termination of electricity service for nonpayment of the charges which were incurred with a supplier. This proposal is at odds with the Commission’s current regulation, set forth at COMAR 20.53.01.07, which prohibits a utility from terminating a residential consumer’s service for failure to pay a competitive supplier’s bill.

Possible legal and regulatory impediments apparently are swept away by the “sleight of hand” approach of declaring the receivables, which are bought by the utility, to be utility charges, even though they will be incurred as a result of a contractual relationship between a competitive supplier and a consumer, and not the regulated relationship between the utility and the consumer. As a result, the utility may look to its ratepayers to cover any and all costs related to the purchase of receivables, including the cost of bad debt attributable to another company.

From a ratepayer perspective, this is simply wrong. First, the inclusion of any expenses related to the purchase of another company’s receivables in residential rates

may violate the “just and reasonable rates” requirement set forth in PUC Article, §4-101, since they are not “necessary and proper expenses.” PUC Article, §4-101(3). These expenses have no relation to either the utility’s actual purchase of electricity supply (SOS) for its residential customers, or to the expenses incurred by the utility to provide and maintain the distribution infrastructure. As such, the inclusion of any such expenses is subject to challenge by ratepayers.

Furthermore, the inclusion of such supplier-incurred expenses, whether as costs related to purchase of the receivables, or “bad debt” resulting from the purchase, is not “consistent with the public good.” The expenses related to these receivables would be paid by residential ratepayers for the sole purpose of removing an ordinary cost, and therefore risk, of doing business (“bad debt”) from the competitive suppliers, and requiring residential consumers to shoulder the risk and bear the cost. In no other business world, except for a deregulated construct that places the promotion of retail competition above consumer rights and protections, could such a proposal receive serious consideration. It also is ironic, in that so-called competitive companies effectively would be handed subsidies, paid for by captive ratepayers, in the name of promoting “retail competition.” All competitive suppliers, whatever the merits of their business model, are guaranteed to be “debt-free” when it comes to their customers.¹² Furthermore, ratepayers would be in the position of providing a guaranteed revenue stream for companies whose actions may or may not be “consumer friendly” or in compliance with Maryland law and

¹² For example, the Commission recently suspended the license of Ohms Energy Company, LLC as a result of financial difficulties.¹² That matter is pending. *See, In the Matter of the Commission’s Investigation into Ohms Energy Company, LLC’s License to Supply Electricity or Electricity Generation Services in Maryland (Case No. 9118)*. If this proposed regulation had been in place this past year, the receivables of Ohms Energy Company would have been purchased by BGE and paid for by BGE residential ratepayers, without regard to the quality of the business practices of the company.

regulations, or that can decide to shut down operations and no longer serve residential consumers at any time.

C. The Commission Should Maintain a Prohibition against Termination of Electricity Service for Non-Payment of Charges Incurred for Competitive Supplier Services

Proponents of mandatory purchase of receivables have argued that utilities should be required to purchase receivables from competitive suppliers, so that the suppliers in effect get to use the “hammer” of electricity service termination to collect past-due monies. The proposed regulation, COMAR 20.53.07.06, would accomplish this with a statement that supplier charges purchased by utilities will be deemed “utility charges.” The Commission therefore would attempt by regulatory declaration to subject any consumer who owes money as a result of a contract with a competitive supplier to the threat of full electricity service termination. The purported goal is to create a level playing field between the utilities and competitive suppliers, and thereby promote and benefit retail competition. It certainly does not benefit residential ratepayers.

Historically, termination of an essential service like electricity service has generally been viewed as an extraordinary remedy available to highly regulated public utilities pursuant to applicable state law and regulation. While Maryland Commission regulations have permitted public utilities to deny or terminate service for undisputed bills of a customer for a period up to seven years, which is past the statute of limitations period for filing a court action for monies due, the utilities have long been prohibited from terminating service for bills due from a separate business run by the utility, such as HVAC and appliance services, that do not related expressly to the provision of electricity

service to the customer. Such services were deemed separate transactions, and collateral to the public utilities' statutory duty to provide essential electricity service to residential consumers. This distinction made sense because of the unique status of the public utilities; they hold a public franchise to provide essential utility service. The prohibition on utilities' use of a service termination threat to secure payment of a collateral debt, for example, a service contract, was intended to limit the utilities' right to use termination or denial of essential service, or threats thereof, to secure payment of bills for non-essential services.

Yet, the Commission is considering proposed regulations that in effect circumvent these long-standing rules, and require conversion of the debt of a private entity into the debt of a public utility. By means of this contractual exchange (supplier gets a guaranteed revenue stream and the utility/ratepayers get receivable to be collected), the supplier-incurred charges are miraculously converted into "utility charges," and the consumers subject to the threat of termination of all electricity services, including distribution services. OPC believes that a regulatory mandate to convert supplier charges into utility charges, and thereby extend the service termination remedy to competitive suppliers, which would allow these businesses to avoid the judicial collection process that all other businesses must use, is contrary to common law principles underlying the public utilities' use of service termination as a self-help remedy. This provides no benefit or protection to residential consumers; instead, public utilities and their residential ratepayers are charged with guaranteeing a revenue stream for suppliers, which are non-public utilities, and taking on the task and costs of debt collection, whether through service termination or traditional debt collection activities. This is not in their interest.

D. The Commission Should Maintain the Existing Telephone Contract Protections for Residential Consumers

The Commission's current regulations explicitly recognize that the Maryland Telephone Solicitation Act, Md. Comm. Law Code Ann., § 14-2201 et seq., applies to the contracting activities of competitive suppliers, since these companies are subject both to the licensing authority of the Commission and the requirements of the consumer protection laws of Maryland. COMAR 20.53.02.04(A); PUC Article, § 7-507(q). While the proposed regulation, COMAR 20.53.07.07(D), also recognizes that the Telephone Solicitation Act applies to competitive suppliers, the proposed regulation, COMAR 20.53.07.08(B) (4), reduces the existing level of consumer protection requirements for consumers solicited by telephone. This is accomplished by permitting those suppliers who are exempt from the Telephone Solicitation Act to contract with residential consumers without a signed contract. These exemptions include companies that have a pre-existing business relationship with the consumer, including suppliers that are affiliates or subsidiaries of public utilities.

OPC maintains its opposition to the absence of a provision in COMAR 20.53 to require a written contract signed by the consumer for validation of all telephone solicited supplier contracts. The absence of such a provision creates a competitive advantage for suppliers with preexisting business relationships with consumers, since under the Maryland Telephone Solicitation Act, Commercial Law Article, §§14-2203—14-2204, Annotated Code of Maryland, these suppliers are exempt from securing a signed consumer contract following a telephone solicitation, while suppliers without preexisting business relationships with consumers are not.

Continued for signatures:

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