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BILL NO.: Senate Bill 0001
Electricity and Gas - Retail Supply
Regulation and Consumer Protection

COMMITTEE: Education, Energy, and the Environment Committee

HEARING DATE: January 25, 2024

SPONSOR: Senator Augustine

POSITION: Favorable with amendments

The Office of People's Counsel ("OPC") supports Senate Bill 0001 with the amendments described below. SB0001 will provide urgently needed protections for consumers interacting with the retail energy supply market.

Background

In 1999, the General Assembly passed Maryland's Electric Customer Choice and Competition Act ("the Act").¹ The Act "deregulate[d] the generation, supply and pricing of electricity" by enabling companies other than the State's monopoly utilities to sell electricity directly to retail customers.² The intent of the Act was to "create competitive retail electricity supply and electricity supply services markets . . . [and] provide economic benefits for all customer classes[.]"³

Since 1999, however, the benefits for residential customers from retail choice have been sparse. OPC's experience in this regard was confirmed by a recent study of retail energy suppliers operating in Baltimore Gas and Electric's service territory showing that

¹ 1999 Md. Laws Ch. 3, 4 (S.B. 300/H.B. 703).

² Md. Code Ann., Pub. Util. ("PUA") § 7-504(3).

³ PUA §§ 7-504(2), 7-504(4).

retail supply customers are not, in fact, paying competitive prices.⁴ Compounding this problem, the study also found that “households who live in low-income areas pay higher [electricity] prices, on average, than households in high-income areas.”⁵

At the same time, the harm to customers has been plentiful. Current laws and regulations enable retail energy suppliers to engage in deceptive and unfair marketing practices that are hard to uncover and even harder to adequately remedy. OPC has litigated before the Public Service Commission (“PSC”) numerous cases successfully alleging that retail energy suppliers have violated Maryland law and regulation by engaging in unfair and deceptive practices that resulted in harm to customers.⁶ In just two of those cases, Maryland customers were overcharged by over \$14 million and \$6 million dollars, respectively, and individual customers were overcharged by thousands of dollars.⁷

Consumer complaints against retail energy suppliers include unfair and deceptive marketing and solicitation practices such as:

- Telemarketing based on incomplete or deceptive advertising material that results in a binding supply contract just based on a telephone call;⁸
- Deceptively marketing products as “green energy,” “renewable energy,” and “carbon-free” without defining these terms;
- Enrolling customers without their consent, making misleading claims about potential savings, and posing as representatives of a customer’s utility company;⁹

⁴ Kahn-Lang, Jenya, *Competing for (In)attention: Price Discrimination in Residential Electricity Markets*, pg. 1, (Mar. 7, 2023), <https://drive.google.com/file/d/1IClpnaf3gVy3X94YWhLtSSTMWKTzi16K/view>.

⁵ *Id.* at 43.

⁶ See e.g., PSC Case No. 9324, *In the Matter of the Investigation into the Marketing Practices of Starion Energy PA, Inc.*; PSC Case No. 9613, *In the Matter of the Complaint of the Staff of the Public Service Commission against SmartEnergy Holdings d/b/a SmartEnergy*; PSC Case No. 9615, *In the Matter of the Complaint of the Staff of the Public Service Commission v. U.S. Gas & Electric and Energy Services Providers, Inc., D/B/A Maryland Gas & Electric*; PSC Case No. 9617, *In the Matter of the Complaint of the Staff of the Public Service Commission Against Smart One Energy, LLC*; PSC Case No. 9647, *Complaint of the Md. Office of People’s Counsel Against SunSea Energy, LLC*.

⁷ Case No. 9617, Order No. 89526 (Mar. 6, 2020); Case No. 9613, Order No. 90515 (Feb. 22, 2023).

⁸ The most egregious example of this type of supplier behavior is Smart One Energy. Through telephone marketing, the company was able to learn the account number or customer ID for the customer and enroll the customer without their consent. The company had no other interaction with the customer other than to put excessive charges—usually about twice the utility’s rate—on the customer’s bill. This practice went on for years before being detected. The company enrolled over 17,000 Maryland customers. Many customers had no idea that they were being served by a supplier, had no knowledge of Smart One Energy, and endured overcharges for years. See PSC Case No. 9617, Order No. 89219 (August 2, 2019).

⁹ See e.g., PSC Case No. 9324; PSC Case No. 9615; PSC Case No. 9647.

- Deploying third-party sales agents who are unlicensed and unregistered, making it difficult to prevent agents who violate Maryland regulations from continuing to operate in Maryland;
- Locking customers into variable rate contracts that significantly increase in price and charge excessive early terminations fees.

Although the PSC has a customer complaint process, PSC enforcement actions thus far have done little to curtail retail supplier misconduct. In fact, the number of consumer complaints filed against retail energy suppliers operating in Maryland is growing. In fiscal year 2021, consumers filed 157 complaints with the PSC’s Consumer Affairs Division; in 2022, consumers filed 86 complaints; and in 2023, consumers filed 641 complaints.¹⁰ It is likely that the numbers of consumers affected by supplier misconduct are substantially greater than the number of complaints.

Enforcement cases have not effectively deterred bad actors in the retail supply market. In our view, while the PSC has found violations of statutes and regulations, its remedies have been weak, allowing retail suppliers to indefinitely continue to profit from violating the law and otherwise failing to deter future violations. For example, one retail supplier racked up 41 new consumer complaints just months after restarting marketing and solicitation activities following an enforcement action before the PSC.¹¹ Finally, enforcement cases often span several years, which means that even if the affected customers are granted relief, that relief is substantially delayed. In one current case on appeal, the supplier continues to serve—and receive revenues from—customers that the PSC found in 2021 had unlawfully enrolled customers.¹²

The best way to minimize abuses and ensure that customers benefit from retail choice is to have strong consumer protection laws and regulations that limit the opportunities for violations and deter future non-compliance. SB 0001 will enhance customer protections by:

- Enhancing licensing requirements, for example, by requiring retail energy suppliers to reapply for a license every three years, providing additional opportunities for the PSC to review suppliers’ conduct and to deny problematic suppliers from selling in the state;

¹⁰ Consumer complaint information is publicly available on the PSC’s website: <https://www.psc.state.md.us/retail-energy-supplier-complaint-reports/>.

¹¹ PSC Case No. 9647, *Notice of Probable Cause Hearing* (Public and Confidential), ML No. 301288 (Feb. 13, 2023).

¹² *Matter of SmartEnergy Holdings, LLC*, 256 Md. App. 20 (2022) (on appeal to the Sup. Ct. of Md.).

- Increasing the penalty amount from \$10,000 to \$25,000 and providing that each customer who is affected by a retail supplier’s misconduct is a separate violation;
- Eliminating most variable rate contracts;
- Prohibiting commission-based compensation for energy salespersons, which will remove the incentivize for deceptive marketing and solicitation practices;
- Prohibiting the sale and purchase of accounts receivable; and
- Eliminating early termination fees; and many other protections.

Comments

SB0001 enhances consumer protections in the retail energy supply market in several important respects. To further advance the goals of the bill, OPC recommends the modifications outlined below. OPC understands that forthcoming amendments may address some of these issues, and OPC is generally supportive of these amendments.

1. Municipal utilities serving customers solely in their distribution territories and community choice aggregators should be exempt.

As currently written, sections 7-507.1 and 7-510(d)(1) of SB001 could be read to apply not only to third party retail suppliers, but also to municipal utilities and community choice aggregators. However, the laws and regulations governing retail energy suppliers generally do not treat these entities the same as retail electric and gas suppliers. Section 7-507 of the Public Utilities Article (“PUA”) provides that a retail electricity supplier must have a license to operate in Maryland, but a municipal electric utility serving customers solely in its distribution territory or a community choice aggregator does not. In fact, municipal utilities cannot allow retail suppliers to operate in their service territory unless the PSC approves the utility’s plan for integration of retail suppliers.¹³ SB0001 should be amended to clarify that municipal utilities and community choice aggregators are similarly exempt from sections 7-507.1 and 7-510(d)(1).

2. Consumer protections should be extended to retail natural gas customers in addition to retail electric customers.

Section 7-510 of SB 0001 provides for multiple consumer protections for retail electric customers—including prohibiting variable rate contracts, commission-based compensation, and the transfer of accounts receivable—but these same protections are

¹³ PUA § 7-510(a)(2)(iv).

not extended to retail gas customers. Under COMAR provisions 20.53.07 and 20.59.07, the same consumer protections are afforded to both retail electric supply customers and retail natural gas supply customers, and SB0001 should be amended to reflect the same parity.

3. Investor-owned utilities should not be authorized to market standard offer service (“SOS”).

Section 7-510(c)(14)(ii)(6) of SB0001 would authorize investor-owned electric companies to market standard offer service (“SOS”) consistent with the consumer protections in the bill. OPC is concerned that allowing the utilities to market SOS interferes with, rather than bolsters, the competitive market. Because each utility operates in its service territory as a regulated monopoly, the utility’s SOS is the default energy product available to consumers in that service territory. Therefore, utilities do not need to market their product—it is already the default product. Likewise, because their energy product is the default product, investor-owned utilities do not need to compete in the free market. OPC understands that a forthcoming amendment will prohibit utilities from passing on to ratepayers the costs associated with marketing SOS. While OPC supports the intent of this amendment, utilities have non-financial advantages—such as brand name recognition as a result of the government-granted exclusive franchise rights—that give them advantages beyond direct promotion. The better approach is to amend SB0001 to remove 7-510(c)(4)(ii)(6) in its entirety.

4. The PSC is the appropriate body to regulate green marketing claims.

As OPC understands it, section 7-707 of SB0001 is intended to ensure the integrity of retail electricity suppliers’ “green” marketing claims by requiring suppliers who claim their products benefit the environment to: (a) buy renewable energy credits (“RECs”) that qualify under Maryland law to match their environmental marketing claims; and (b) provide an explanation to consumers clarifying what RECs are. OPC supports this intent but is concerned that certain provisions of the bill, as currently written, run counter to this intent, and may prove detrimental to consumers.

First, OPC recommends that a retail energy supplier that markets a product as “green,” as defined in 7-707(a), be required to purchase and retire RECs *in excess of* the existing Renewable Energy Portfolio Standard (“RPS”) requirements, and that the PSC be given the discretion to determine what the appropriate threshold of RECs should be to

avoid deceiving customers. Suppliers should not be able to market their product as “green” or “clean” simply for complying with Maryland’s RPS requirement. Compliance is mandatory. Customers receiving green marketing messages reasonably expect more than minimum statutory compliance. But as drafted, the bill would allow suppliers to “purchase RECs” at the minimum level and market themselves as “green.”

OPC understands that a forthcoming amendment addresses this concern by requiring green power suppliers to purchase and retire RECs to match at least 51% of its customers’ electricity consumption as of the date the bill takes effect, and that the percentage of RECs to be retired must always be at least one full percent higher than the state’s RPS requirement as that requirement increases. While this amendment would ensure that a retail energy supplier marketing a product as green *technically* exceeds what is already required by Maryland law, suppliers should only be able to market their offers as “green” if they *significantly* exceed the requirements of Maryland law. Because of the difficulty in determining reasonable customer expectations and the complexities associated with matching a new requirement to the escalating RPS requirement—as well as other possible policy changes to support clean energy, such as a the “clean power standard” highlighted the Maryland Department of Environment’s recently released climate plan—OPC recommends that rather than dictate the required percentage of RECs in legislation, the PSC be tasked with setting the appropriate requirements.

Second, as currently written, section 7-707(c) of SB0001 requires a retail supplier marketing green power to include a specific disclosure to customers explaining what RECs are. OPC supports the intent to educate customers, but rather than setting this disclosure language in legislation, OPC recommends that the PSC instead be charged with drafting the relevant disclosure language. The PSC has the experience and expertise to draft disclaimers and disclosures that are more likely to be accurate and comprehensible by the public. Further, because technology continues to rapidly evolve and retail suppliers constantly change their marketing practices, it is important that these regulations be continually modified to keep up with the changes. For instance, a disclaimer for “green power” products should change as the mix of generation changes—incorporating more renewable generation sources over time.

For these reasons, SB0001 should be amended to delegate to the PSC the authority to determine what percentage above the RPS is required for a retail energy supplier to market a product as green and to develop the required disclosure statement.

OPC supports the urgent consumer protections in SB0001. Our office is continuing to review the bill and will highlight any other issues we identify as the session advances. We look forward to working with the sponsors to ensure maximal protection for residential customers.

Recommendation: OPC requests a favorable Committee report for SB0001 as amended as described above.