

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND**

Revisions to COMAR to implement changes  
required under Section 4-308 of the Public Utilities  
Article

**Rulemaking RM \_\_\_\_**

**PETITION FOR RULEMAKING**

The Maryland Office of People’s Counsel files this petition for rulemaking and requests that the Commission initiate a rulemaking proceeding to revise the Code of Maryland Regulations (“COMAR”), to implement the requirements of § 4-308 of the Public Utilities Article.

**INTRODUCTION**

During the 2021 legislative session, the General Assembly enacted new statutory requirements regulating “supply offers” from electric or gas suppliers to customers in the State receiving energy assistance funds through a program administered by the Office of Home Energy Programs.<sup>1</sup> This legislation serves two important public purposes. *First*, it protects customers on energy assistance from exorbitant energy bills resulting from contracts with retail suppliers that charge—oftentimes—well above the utilities’ rates for default service. *Second*, it promotes sound fiscal policy, by intending to maximize the value of the State’s spending on energy assistance. These policies require Commission regulations—standards for compliance that apply across all retail suppliers and utilities.

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<sup>1</sup> Acts 2021, c. 636, § 1, eff. July 1, 2021; Acts 2021, c. 637, § 1, eff. July 1, 2021.

Only with regulations can the Commission be assured of statewide compliance with the prohibition on unapproved offers being sold to energy-assistance customers. Indeed, regulations are necessary even if no retail suppliers seek Commission approval for offers to these customers.

Among other requirements, the legislation, codified at § 4-308 of the Public Utilities Article, imposes limits on the price and fees electric or gas suppliers may charge to energy assistance customers<sup>2</sup> and requires the Commission to prepare detailed reports each year concerning six enumerated metrics.<sup>3</sup> The prohibition, which takes effect on July 1, 2023<sup>4</sup>, requires Commission action to ensure the statutory requirements are met, for at least five reasons:

- Successful compliance with the statute will require generally applicable guidance to retail suppliers and utilities, regardless of whether a single retail supplier seeks Commission approval of an offer intended for energy-assistance customers.
- Regulations are necessary to clarify the statute and its application, including the statutory “look-back” period that bars sales of unapproved offers to customers that received energy assistance “during the previous fiscal year.”
- Extensive litigation over retail supplier compliance with statutory and regulatory consumer protection provisions demonstrates suppliers’ efforts to evade regulation, and regulations will add certainty and decrease costly and time-consuming litigation.

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<sup>2</sup> See PUA § 4-308(b).

<sup>3</sup> *Id.* at § 4-308(d).

<sup>4</sup> *Id.* at § 4-308(b).

- Regulations will enhance transparency, provide clarity to suppliers and utilities, and give stakeholders an opportunity to provide input into this important consumer protective legislation.
- The Commission’s discretion to proceed by order rather than regulations is limited and depends on the requirements adopted, which in this case must be generally applicable to be effective and cause compliance.

Each of these points is explained further below, following the description of the requirements of PUA § 4-308.

### **REQUIREMENTS OF PUBLIC UTILITIES ARTICLE § 4-308**

Section 4-308(b)(1) of the Public Utilities Article states that, beginning on July 1, 2023, unless the Commission has approved a supply offer, a third-party retail supplier may not offer to:

- provide electricity or gas to households in the State that have received energy assistance during the previous fiscal year;
- renew a contract to provide electricity or gas to households in the State that are enrolled in an energy assistance program; or
- charge a termination fee to households in the State that have received energy assistance during the previous fiscal year.

Section 4-308(b)(2) also requires that “[a]n approved supply offer from a third-party retail supplier shall include a commitment, for the entirety of the term of the supply offer, to charging at or below the standard offer service rate or gas commodity rate for customers receiving energy assistance.”

Section 4-308(b)(3) states that “[i]f a third-party retail supplier’s offer is not approved by the Commission, the third-party retail supplier may not: (i) receive funds from an energy program administered by the Office of Home Energy Programs; or (ii) charge a customer receiving assistance from an energy program administered by the Office of Home Energy Programs.

Subsection (d) of the statute establishes requirements for the Commission to publish an annual report that includes:

- the names and the total number of suppliers that applied for approval to sell to energy assistance households;
- the names and the total number of suppliers that were approved under subsection (a) of this section;
- the total number of suppliers that were rejected, if any;
- the total number of energy assistance households that were signed up with a third-party supplier, as reported by the supplier;
- the total number of submitted supplier enrollments that were denied because the supplier was not approved to serve energy assistance households, as reported by the utility; and
- the total number of self-identified energy assistance households that filed complaints about their third-party supplier.

To date, the Commission has taken no formal action to implement the new law.<sup>5</sup>

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<sup>5</sup> OPC has made several inquiries with Commission staff about the status of implementation of the legislation; to date, the topic has not been put on any work group agendas, nor has there been any other formal action to implement the law.

## ARGUMENT

OPC explains in five parts below why the Commission should promulgate regulations as the most effective—and likely only effective—means of achieving retail supplier compliance with PUA § 4-308 and accurate reporting to the General Assembly.

*First*, compliance with PUA § 4-308’s requirements will require generally applicable guidance to retail suppliers and utilities to be effective. Regardless of whether a single retail supplier seeks Commission approval of an offer, factual scenarios are inevitable that require Commission action if low-income customers are to benefit from the protections the legislation seeks to advance by prohibiting sales of unapproved offers to those on energy assistance.

*Second*, regulations can clarify the “look back” period in PUA § 4-308(b). That period prohibits sales of unapproved offers to any households that received energy assistance “during the previous fiscal year.” Commission guidance is necessary to interpret this provision.

*Third*, current and past experience with retail supplier compliance evidences the lengths to which retail suppliers will go to avoid application of statutory provisions intended to protect customers. Regulations will lessen disputes and therefore reduce time-consuming litigation and delayed customer benefits.

*Fourth*, regulations enhance transparency and give stakeholders—including utilities, retail suppliers and customers—opportunity for input. Stakeholder input will assist with effective implementation of PUA § 4-308, which serves an important public purpose for consumers and for most effective use of the State’s budget.

*Fifth*, the Commission’s discretion to proceed by order is limited under the Administrative Procedures Act. As the Court of Appeals has ruled—applying a statute similarly stating that the Commission can proceed by regulation or

order—whether the APA process for promulgating regulations must be followed depends on what the standards do; here, effective standards for implementing § 4-308 will meet the APA’s definition of a “regulation.”

**I. Generally applicable guidance is necessary for effective utility and retail supplier compliance with PUA § 4-308’s requirements.**

The Commission will have to issue general guidance to ensure compliance with the statutory prohibition on unapproved retail supplier sales that takes effect July 1, 2023. Without rulings directing how utilities and retail suppliers will ensure compliance, the customers that the statute intends to help will be denied its benefits. Below we provide examples of general regulatory issues that should be addressed in advance of the statute’s July 1, 2023, effective date. Importantly, these examples all need to be addressed regardless of whether any retail suppliers actually seek Commission approval for supply offers to customers on energy assistance.

*Compliance on day one.* Without clear Commission action, on July 1, 2023, § 4-308’s effective date, retail suppliers will be out of compliance—to the detriment of customers and the State. It is well-established that retail suppliers sign up a disproportionately large number of low-income customers, at rates that are above the utility rate. For these and for customers in the “look back” period, Commission guidance is necessary such that utilities across the State apply and customers are adequately protected consistent with the statutory purpose, from its onset on July 1, 2023. Retail suppliers will be in violation on that date regardless of whether a single retail supplier

asks the Commission to approve a supply offer for energy-assistance customers.

*Ongoing compliance.* Outside of initial compliance, the Commission will face ongoing situations implicating retail supplier compliance with PUA § 4-308. Customers can at any time sign up with retail suppliers and then subsequently get OHEP assistance for the first time. Other customers may churn in and out of energy assistance within any given year or over many years. The statutory prohibition on retail suppliers selling to any of these customers without an approved offer must be enforced even if no retail suppliers ever seek approval of an offer.

*Look-back period.* Ongoing compliance cannot be assured by simply comparing utility bills in a given month against customers receiving energy assistance that month; rather, compliance requires assessing whether customers were on assistance during the “look-back” period prior to a supplier’s attempt to sign a contract with the customer. As described further below, regulations are the best vehicle for clear and consistent compliance with the look-back period set forth in the statute.

*Frequent changes in utility rates.* Regulations are also the best means of policing the statutory requirements in light of the frequent changes to utility rates for gas supply or standard offer service. These rates are adjusted periodically to reflect changes in commodity market prices. Under the statute, the retail supplier rate cap must decrease if the utility rate decreases. Commission guidance is critical to ensuring that retail suppliers and utilities consistently comply when utility prices change.

*Reporting requirements.* Generally applicable rules are the most effective means

of fulfilling the reporting requirements of PUA § 4-308(d). Section 4-308(d) requires the Commission to capture information from both utilities and retail suppliers for reporting to the General Assembly. In addition to reporting information on supply offer application approvals and denials, PUA § 4-308(d)(1) requires the Commission to collect —

(iv) the total number of energy assistance households that were signed up with a third-party supplier, *as reported by the supplier*;

(v) the total number of submitted supplier enrollments that were denied because the supplier was not approved to serve energy assistance households, *as reported by the utility*; and

(vi) the total number of self-identified energy assistance households that filed complaints about their third-party supplier.<sup>6</sup>

For this required reporting to the legislature, third-party suppliers have to report on all customers on energy assistance. That may mean reporting on their own non-compliance with PUA § 4-308—making clear, advance uniform standards even more important. Moreover, based on our understanding of who holds the relevant information, the utilities (or OHEP) will have to provide retail suppliers information regarding which customers are on energy assistance. The utilities should have uniform guidance on how to report “the total number of submitted supplier enrollments that were denied” because they are selling unapproved offers.

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<sup>6</sup> PUA § 4-308(d)(1) (emphasis added).

## II. Regulations are the best vehicle for clarifying the “look back” period in PUA § 4-308(b).

Regulations are needed to clarify how the Commission will apply the statutory language prohibiting a retail supplier from making an offer to households that “received energy assistance *during the previous fiscal year.*” This provision establishes a “look-back” period that intends to ensure that retail suppliers do not sign on customers who recently received energy assistance unless it is an approved offer.

But the “previous fiscal year” language is subject to different interpretations. Under the following different facts, it remains unclear whether the retail supplier is permitted to sign the household with an unapproved offer or it is barred from doing so because it “received energy assistance during the previous fiscal year.”

### *Example A:*

- July of fiscal year 2024: Customer starts receiving assistance.
- August of fiscal year 2024 (one month later): Household signs up with retail supplier.

### *Example B:*

- June of fiscal year 2023: Household receives assistance for the first time.
- June of fiscal year 2024 (12 months later): Household signs up with retail supplier.

In Example A, one month has passed since the customer was signed up with a retail supplier, but since that month is in the same fiscal year, the customer literally (and arguably) did not “receive[] energy assistance during the previous fiscal year.” In Example B, however, 12 months have passed since the customer was on energy

assistance, but the customer did—literally—receive assistance “during the previous fiscal year” when it received service before fiscal year 2024. This would mean the statute prohibits the retail supplier from selling an unapproved offer to the customer who has not received assistance in the past 12 months but does *not* apply to a customer who received assistance during the previous month—a result that arguably is absurd and unintended.

The only logical interpretation that gives meaning to the “previous fiscal year” language is that the General Assembly intended to cover households that received energy assistance during the current fiscal year and the previous fiscal year. Commission regulations can clarify this point, and its interpretation will be given deference.

There may be other potential ambiguities in the statute that regulations would clarify. Indeed, several of the factual situations highlighted in Part I above also could give rise to different interpretations of the statute. The more ambiguities like these that can be resolved in regulation, the less likely it is that they will arise in litigation—saving all parties, as well as the Commission, unnecessary expense and time, while also furthering the statute’s remedial purposes.

### **III. Current experience with retail supplier compliance shows the need for regulations.**

The past 20 years of retail choice include many examples of supplier noncompliance with State consumer protection laws and Commission regulations; highlighting the need for the Commission to proactively issue guidance for how retail suppliers and utilities should comply with PUA § 4-308. Recent examples abound:

- i) Retail suppliers have failed to comply with the Maryland Telephone Sales Act and have raised numerous arguments in litigation to avoid being subject to the Act.<sup>7</sup>
- ii) Retail suppliers made arguments—rejected by the Commission—regarding what documentation is sufficient to comprise a contract.<sup>8</sup>
- iii) Retail suppliers have failed to properly verify telephone sales using independent third parties.<sup>9</sup>

Unfortunately, while these issues have been or are being litigated before the Commission or on appeal, suppliers who have obtained customers through deceptive and other unlawful means continue to overcharge consumers.

Many of the litigated retail supplier issues cover topics for which the Commission has promulgated rules. Those regulations serve to support and strengthen the Commission’s hand in the litigation, and they likely have avoided additional arguments and challenges. The litigation further demonstrates the propensity of some retail suppliers to exploit—and try to create—loopholes in statutes intended to protect customers from predatory conduct. PUA § 4-308 is another statute intended to protect customers from

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<sup>7</sup> See *In the Matter of Direct Energy*, Case No. 9614, Order No. 90208 at ¶¶ 41-57 (May 4, 2022); *In the Matter of SmartEnergy Holdings, LLC D/B/A Smart Energy*, Case No. 9613, Order No. 89795 at ¶¶ 54-80 (March 31, 2021); see also *Complaint of the Maryland Office of People’s Counsel against SunSea Energy, LLC*, Case No. 9647, Order Number 89914, (August 18, 2021); *In the Matter of the Complaint of the Staff of the Public Service Commission against Smart One Energy, LLC*, Case No. 9617, Order No. 89526 (March 6, 2020).

<sup>8</sup> See *In the Matter of Direct Energy*, Case No. 9614, Order No. 90208 at ¶ 57 (May 4, 2022)(ruling that the supplier’s practice of using a group of documents incorporated by reference as its contract failed to satisfy the requirements of the MTSA or Commission regulations).

<sup>9</sup> See *In the Matter of SmartEnergy Holdings, LLC D/B/A Smart Energy*, Case No. 9613, Order No. 89795 at ¶¶ 126-127 (March 31, 2021).

predatory activity, and—as explained above—there are a variety of ambiguous factual situations (and statutory language) that retail suppliers can and likely will exploit to avoid application of PUA § 4-308.

Put simply, the retail supplier litigation currently before the Commission or on appeal demonstrates the sorts of controversies that can arise as the Commission moves forward to enforce compliance with State laws. By making clear how the Commission expects retail suppliers and utilities to eliminate noncompliance and demonstrate compliance, regulations will help the Commission avoid inefficient, costly, and time consuming litigation. And, importantly, the proactive setting of regulations will help ensure that customers on energy assistance get the benefits intended by PUA § 4-308 and the State maximizes its efforts to support those customers by not supporting exorbitant rates retail suppliers charge those customers.

**IV. Regulations enhance transparency and give stakeholders—including utilities, retail suppliers, and customers—opportunity for input.**

The General Assembly enacted PUA § 4-308 with an important public purpose in mind—preventing customers who receive energy assistance from paying high prices for their energy supply. The statute evinces a clear purpose of protecting low-income consumers and getting the most out of the State budget. Stakeholders have an interest in its effective implementation. By promulgating regulations, the Commission will ensure that all stakeholders have input and the Commission can make well-informed decisions as to how to implement the statute, affording customers the protections the General

Assembly intended to confer.

Many retail suppliers offer multiple electric and gas supply products with differing prices and contract terms. Assuming any interest at all on the part of suppliers to gain Commission approval of offers for customers on energy assistance, regulations will allow the Commission to assess how suppliers or the Commission should identify approved supply offers such that utilities can easily determine whether the offer actually provided to customers receiving energy assistance is an approved offer, rather than one of the supplier's other, unapproved offers. Express rules will add transparency and assist the Commission and all stakeholders with understanding how approvals are sought and how their approvals (or denials) will be administratively handled. Moreover, the legislature's goal of maximizing the value of energy assistance funding likely won't be realized if compliance varies by utility or by supplier.

Retail suppliers and utilities, too, will benefit from the efficiencies and certainty gained by promulgating regulations. Without the clarifying effect of generally applicable guidance on how the Commission will interpret the statute and apply it to a variety of factual situations, both utilities and law-abiding retail suppliers will face situations where they could risk running afoul of the statute, subjecting themselves to enforcement action.

**V. The Commission’s discretion to proceed by order is limited under the Administrative Procedures Act.**

The Administrative Procedures Act defines a “regulation” as a “statement” of “general application,” with “future effect,” that is adopted to “carry out a law” and is

“in any form, including:

1. a guideline;
2. a rule;
3. a standard;
4. a statement of interpretation; or
5. a statement of policy.<sup>10</sup>

Commission action to effectively implement PUA § 4-308 will meet this APA definition of “regulation.” The array of legal and factual issues that the Commission must address to ensure retail suppliers comply with § 4-308—as well as the Commission’s reporting obligations—require uniform application and statutory interpretation across all utilities and retail suppliers. Inconsistent application of the statute to utilities or retail suppliers would be arbitrary and undermine statutory compliance as well as the Commission’s reporting obligations. It is only with generally applicable standards that customers on energy assistance statewide can be assured of the benefits the statute intends them to receive.

Section § 4-308’s reference to proceeding by “regulation or order” does not obviate the need for the Commission to proceed by regulation where its actions meet the statutory definition. In *Delmarva Power & Light Co. v. Public Service Comm’n of*

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<sup>10</sup> Md. Code Ann. State Gov’t Art. § 10-101(g).

*Maryland*,<sup>11</sup> the Court of Appeals addressed the utilities’ challenge to the Commission’s decision not to proceed by rulemaking when it issued affiliate standards of conduct. The Court applied a statute that similarly directed the Commission to proceed by “issu[ing] orders or adopt[ing] regulations.”<sup>12</sup> The Court found that the “generic proceeding” that the Commission had used to develop the standards met the statutory definition of a regulation and should have been promulgated consistent with the APA. The Court reasoned that whether the affiliate standards constituted a regulation “depends on what they do.”<sup>13</sup> The Commission action in *Delmarva Power* met the definition of a “regulation” under the APA because the affiliate standards had general application to virtually all electric and gas utilities in Maryland, were intended to have future effect, and were adopted to carry out a law the agency administers.<sup>14</sup> Just as in *Delmarva Power*, what the Commission does—or should do, for effective implementation of PUA § 4-308—will meet the APA definition of “regulation.”

## CONCLUSION AND REQUESTED ACTION

Regulations are necessary for effective statewide enforcement of PUA § 4-308. Generally applicable rules are needed to ensure compliance for existing customers that on July 1, 2023, have contracts with retail suppliers and those that sign on with retail

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<sup>11</sup> 370 Md. 1 (2002).

<sup>12</sup> *See id.* at 16 (citing PUA § 7-505(b)(10)).

<sup>13</sup> *Id.* at 18.

<sup>14</sup> *Id.* at 26.

suppliers and then start receiving assistance. Regulations will clarify ambiguities in statute and its application to the myriad situations—those predictable situations, described above, and those that are unpredictable but will implicate the requirements of § 4-308. The ongoing litigation with retail suppliers concerning marketing practices and contracting requirements illustrates the need for the Commission to provide clear regulatory guidance and to take efforts to prevent noncompliance before it occurs, rather than engage in lengthy and inefficient litigation to address noncompliance after the fact while customers wait. Aside from protecting customers and the State budget as PUA § 4-308 intends, regulations will benefit law-abiding retail suppliers and utilities by providing clarity and regulatory certainty. Regulations will permit the Commission to ensure that the information needed to prepare and publish this information each year is reported by utilities and suppliers in a uniform manner.

Given the urgent deadlines for implementation imposed by the statute, the Commission should initiate an expedited rulemaking process. To assist the Commission in the development of the regulations, proposed changes to COMAR have been attached to this petition.

*{Continued for Signatures}*

Respectfully Submitted,

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