

ORDER NO. 90545

The Montgomery County Community
Choice Aggregation Pilot Program Work
Group

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

Administrative Docket
PC54

Issue Date: March 15, 2023

ORDER DIRECTING WORKGROUP TO REVISE PROPOSED REGULATIONS

1. In 2021, Maryland enacted HB768, creating § 7-510.3 (hereafter “§ 7-510.3”) of the Public Utilities Article (“PUA”) of the *Annotated Code of Maryland* and amending other sections, which legislation authorized the Commission to begin a pilot program (the “Pilot”) for Community Choice Aggregation (“CCA”) with Montgomery County as the Pilot county. Under the CCA Pilot, the Montgomery County government would, with certain approvals by the Commission, serve as an aggregator for retail electric supply contracts for all residential and small commercial customers in Montgomery County, on an opt-out basis.
2. On July 22, 2021, the Commission established the Community Choice Work Group (the “Workgroup”) within Public Conference 54 (“PC54”) and tasked the Workgroup with developing regulations necessary for the implementation of HB768. On January 24, 2023, the Workgroup filed a Report that included competing sets of proposed regulations (one by Commission Staff and one by Montgomery County) and a description of stakeholder positions across 25 non-consensus issues.

3. On January 25, 2023, the Commission noted a rulemaking based on the proposed regulations contained in the Workgroup Report, with a hearing scheduled for February 23, 2023. Ahead of that hearing (the “Hearing”), the Commission received written comments from State Delegate Lorig Charkoudian; the delegation of Montgomery County legislators; the Montgomery County Council; Grady Management, Inc.; Kay Management Co., Inc.; the Apartment and Office Building Association of Metropolitan Washington (“AOBA”); the Climate Action Plan Coalition; Potomac Electric Power Company; Southern Management; Laurie McGilvray; Montgomery County; a group of retail energy suppliers (“Retail Supplier Coalition”); the Maryland Office of People’s Counsel; the City of Takoma Park; Food & Water Watch; and the Commission Staff.

4. At the February 23, 2023, hearing, the Commission heard arguments on a set of legal and policy issues under dispute between the stakeholders. The Commission then made several legal and policy determinations from the bench and directed the Workgroup to reconsider the non-consensus issues and file revised proposed regulations. For the benefit of the Workgroup members, the Commission, in this Order, restates and clarifies its directions made from the bench on February 23, 2023.

Areas of Non-Consensus

1. The Commission’s Authority to Approve CCA Supply Rates and Procurements

5. The leading issue identified in the Workgroup Report and the stakeholder comments to RM80 concerned whether, under § 7-510.3 of the PUA, the Commission had and should exercise regulatory approval over a CCA’s initial rate offerings, revised rate offerings, and energy procurement contracts.

6. Central to this dispute is § 7-510.3(d)(2) and (e), which read:

(d)(2) The aggregation plan shall:

- (i) detail the processes related to participating in the aggregation activities of a community choice aggregator;
- (ii) contain information on the operations, funding, and organizational structure of the community choice aggregator;
- (iii) provide details on:
 - 1. the rate setting and costs to participants, including an analysis of historical and forecasted trends in electricity prices and a purchasing plan designed to save ratepayers money;
 - 2. methods that the community choice aggregator must use for entering into and terminating agreements with other entities;
 - 3. the rights and responsibilities of participating electric customers;
 - 4. the termination of the aggregation program, if any; and
- (iv) provide for universal electricity access reliability, and equitable treatment of all residential and small commercial electric customers in the county.

(e)(1) At least 60 days after developing an aggregation plan and giving the notice required under subsection (d) of this section, a county may initiate the process of forming a community choice aggregator by filing with the Commission:

- (i) a notice of intent to form a community choice aggregator;
 - (ii) a copy of the aggregation plan developed in accordance with subsection (d) of this section;
 - (iii) a draft local law forming a community choice aggregator; and
 - (iv) proposed terms of service, rates, and categories of charges, fees, or any other costs to customers unrelated to the actual cost of the electricity supply.
- (2) The notice of intent shall include the name of the county in the community choice aggregator.

- (3) A county is a community choice aggregator after:
- (i) submitting the notice of intent and aggregation plan required under this subsection;
 - (ii) the Commission has approved its aggregation plan and proposed terms filed in accordance with paragraph (1)(iv) of this subsection; and
 - (iii) enacting a local law that provides that the county shall act as a community choice aggregator.

a. Staff

7. Commission Staff argues that § 7-510.3 authorizes the Commission to regulate CCA supply rates and procurements and has presented proposed regulations, similar to the Commission’s regulations, governing utility Standard Offer Service (“SOS”). Staff’s position is supported by AOBA.

8. Staff argues that § 7-510.3(e)(1)(iv), requiring Commission approval of “proposed terms of service, rates, and categories of charges, fees, or any other costs to customers unrelated to the actual cost of the electricity supply,” requires the CCA to get Commission approval of rates and service conditions, including future revisions thereto.¹ Staff argues that the alternative position would amount to essentially deleting the language in question, contrary to the rules of statutory interpretation.² Staff further argues that Commission regulation of rates is supported by public policy and historic understanding of the Commission’s role in Maryland’s energy markets, including regulating public-owned utilities.³

¹ Staff at 12-14.

² *Id.* at 16.

³ *Id.* at 16-19.

9. Staff states that § 7-510.3 does not explicitly address whether the CCA needs Commission approval of a proposed change in rates or service conditions.⁴ Staff argues that this authority is implied because Commission approval of initial rates would be meaningless and absurd without continuing authority that requires Commission approval over any changes to those approved rates.⁵

10. Based on these legal conclusions, Staff proposes a set of regulations that operate similarly to the regulatory construct in place for SOS.

b. Montgomery County

11. Montgomery County argues that § 7-510.3 does not authorize the Commission to approve or reject CCA supply rates or procurements.

12. The County argues that the schedule contained in § 7-510.3, which calls for development of the aggregation plan and approval thereof months later, is not feasibly compatible with the Commission having final rates to approve; thus, the legislative intent was not for Commission approval of supply rates.⁶

13. The County argues that the reference to terms of service and rates in § 7-510.3(e)(1)(iv) applies only to those rates or terms of service unrelated to the actual cost of supply.⁷

14. The County also points to items within the legislative history that, it argues, suggest there was no understanding at the time of enactment that the Commission would have rate-setting authority over the CCA.⁸

⁴ *Id.* at 20.

⁵ *Id.* at 20-21.

⁶ Montgomery County at 4-5.

⁷ *Id.* at 8.

⁸ *Id.* at 9-11.

15. The County argues that Staff’s interpretation would increase risk and costs to customers and threaten the viability of the CCA.⁹

16. The County states that, after the Commission approves an aggregation plan per § 7-510.3(e)(3)(ii), the County will operate the CCA within the bounds of that plan, but without the SOS-like review and approval that Staff proposes.¹⁰ During the Hearing, County representatives stated that the County would seek Commission approval for any changes in the approved plan.

c. Commission Decision

17. In examining the text of § 7-510.3, the Commission finds that the text itself is unclear as to the legislative intent on this question. Section 7-510.3(e) does make reference to the Commission approving proposed rates and terms of service, although there is no explanation for what “proposed rates” means. The County’s interpretative position, that “proposed rates” only means rates not related to supply costs, is linguistically awkward.

18. At the same time, the statute gives no suggestion that the Commission should have ongoing approval over changes to supply rates after the creation of a CCA. It is undisputed that, without such ongoing authority, authority over initial rates would be pointless. Similarly, the statute does not suggest that the Commission should have ongoing approval over CCA procurement contracts beyond the implied role of ensuring that procurements occur in accordance with the methods approved in the aggregation plan.

19. Ultimately, the Commission finds that the intent of § 7-510.3 is that the Pilot should proceed without requiring Commission approval of supply rates or procurement contracts. Although the Commission appreciates Staff’s concerns about the need for avoiding

⁹ *Id.* at 15-16.

¹⁰ *Id.* at 3-5.

unnecessary risk to SOS from customer migration, the Commission is optimistic that such risks can be mitigated by ensuring that the CCA has a solid procurement plan, clear customer messaging, ongoing reporting requirements, and a well-managed customer migration schedule. The Commission also notes that the County Executive stated, during the Hearing, that the County is committed to mitigating risks to SOS and bears full responsibility for the risks created by the CCA.

2. Initial Filing Requirements

20. The comments also show a lack of consensus on the question of what information the County must include in its § 7-510.3(d) and (e) filings with the Commission.

21. Staff's proposed filing requirements were predicated on the Commission accepting Staff's position on the legal question above regarding rate-setting and regulation of procurement contracts. Staff's proposed filing requirements, as currently drafted, therefore require unnecessary information in the light of the Commission's decision on that question. For example, Staff's 20.XX.11.02(B)(1) and (6) requires the aggregation plan to set out specific dates for procurement bid windows, dates for Commission hearings to approve bids or proposals, and dates by which the CCA will execute procurement contracts. Staff's 20.XX.11.02(B)(8) assumes Commission approval of changes in rate offerings. Staff's 20.XX.11.03(A)(1) assumes Commission approval of supply rates and terms of service.

22. At the same time, the County's proposed regulations largely re-state the statutory requirements. The Commission is persuaded that the County's proposed regulations will not provide the regulatory clarity necessary for the Commission to evaluate and approve or disapprove the County's CCA application.

23. In forthcoming proposed regulations from the Workgroup, the Commission expects draft language that establishes requirements: (1) that the County must describe with

sufficient detail the manner in which it intends to set rates and assign costs to customers; (2) that the County must describe its purchasing plans and contracting methods with sufficient detail to ensure that such plans are feasible and will result in the County establishing a competitive process to procure the necessary energy contracts at just and reasonable rates; (3) for a mitigation plan that will minimize the impact on Standard Offer Service; and (4) any other filing requirements Staff judges to be necessary to fairly evaluate the County's application in the light of the directives of the Commission in this proceeding and the standards of § 7-510.3.

24. Such regulations should be detailed and specific, in the manner of Staff's proposed regulations. They should, however, allow the County to exercise reasonable discretion and flexibility in scheduling procurements and rate setting without the necessity for Commission approval, so long as such actions are consistent with an approved aggregation plan.

3. Notice and Opt-Out

25. The comments also show a lack of consensus on how the customer notice and opt-out provisions of § 7-510.3 should be implemented or how enrollment errors should be handled. Particular areas of dispute concerned who should manage customer opt-out responses; how opt-outs would work for customers with multiple accounts, such as multi-unit property managers; and whether customers receiving retail electric supply should receive the same notices as SOS customers.

26. Staff, AOBA, and the real-estate management companies argue that the statute provides customers the option to opt-out through their electric utility and requires the utility to reject CCA enrollments for customers who have opted out of CCA service or who have

enrolled with a competitive retail energy supplier. The Utilities argue that they should not be required to police enrollments and opt-outs and that the CCA should be responsible.

27. The Commission finds that § 7-510.3 does not provide for a permanent opt-out process, nor does it exempt any class of customers from the statutorily required notices. During the Hearing, the participating stakeholders indicated that, with additional Workgroup meetings, they could reach a resolution on an opt-out procedure that satisfied all remaining concerns.

28. In forthcoming proposed regulations from the Workgroup, the Commission expects draft language that (1) tasks the CCA and the Utilities with developing processes for preventing and handling enrollment errors and (2) permits the Commission's Consumer Affairs Division ("CAD") to direct the CCA to re-rate customers erroneously enrolled.

4. Advertising

29. The comments also show a lack of consensus on the manner of customer advertising that the CCA should be permitted to engage in. Both Staff and the Retail Supplier Coalition argue in favor of restricted advertising, noting that retail suppliers are subject to advertising restrictions. At the Hearing, the County argued that Staff's proposed restrictions are unclear.

30. The Commission is concerned that the CCA would effectively permit a retail energy supplier, through the CCA, to market in a manner ordinarily prohibited. In forthcoming proposed regulations from the Workgroup, the Commission expects draft language that works toward a middle ground between the two positions and that ensures the necessary regulatory clarity. The proposed regulations should permit educational and informational communications with ratepayers but not permit unrestricted commercial or promotional advertising.

5. Issues Not Addressed at the Hearing

31. The Workgroup Report and the stakeholder comments raised a number of other concerns not addressed at the Hearing. Those concerns include, but are not limited to, (1) the application of PUA § 4-308 (approval of energy assistance household supply offers) to the CCA and (2) the application of Commission regulations governing supplier consolidated billing to the CCA. Notwithstanding the lack of direction herein on those issues, the Commission expects the Workgroup stakeholders to work toward consensus in a single set of proposed regulations.

32. Additionally, although the Commission declined to adopt Staff's proposed regulations that would establish Commission rate-regulation over the CCA, the Commission finds that the protection of Montgomery County customers and utility SOS customers necessitates regular reporting on numerous areas including, but not limited to, enrollments, rates, procurements, and customer transition. In forthcoming proposed regulations from the Workgroup, the Commission expects draft language establishing such a reporting regime that will provide the necessary information for Staff, Utilities, and other stakeholders to monitor the progress of the Pilot, prevent injury to ratepayers or utility SOS programs, and enable the Commission to make its statutorily required reports to the legislature, while minimizing unnecessary burden on the County or Utilities. Staff's proposed mitigation regulations, including 20.XX.19 in RM80, should serve as a starting point.

33. The filings directed in this Order will result in a future rulemaking session of the Commission. Accordingly, any comments proposing changes to the proposed rules must include redline language.

IT IS THEREFORE, this 15th day of March, in the year of Two Thousand Twenty-Three, by the Public Service Commission of Maryland **ORDERED**:

(1) that Commission Staff is directed to prepare draft redlines, in line with the guidance above, to Staff's proposed regulations for Workgroup discussion; and

(2) that the Workgroup is directed to file a single set of proposed regulations for Commission consideration, to be filed no later than April 25, 2023 and that no report is necessary.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Patrice M. Bubar

Commissioners