GreeneHurlocker
Attorneys at Law

Brian R. Greene
GreeneHurlocker, PLC
4908 Monument Avenue, Suite 200
Richmond, Virginia 23230
(804) 672-4542 (Direct)
BGreene@GreeneHurlocker.com

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By Electronic Filing
Mr. Andrew S. Johnston
Executive Secretary
Maryland Public Service Commission
William Donald Schaefer Tower
6 Saint Paul Street, 16th Floor
Baltimore, Maryland 21202-6806

Re: SMECO Proposed Rider SOS-G, ML#230778

Dear Secretary Johnston:

On June 17, 2020, Southern Maryland Electric Cooperative, Inc. ("SMECO") filed a proposed new rider, Standard Offer Service – Green ("SOS-G"). SMECO contends that the new rider is intended to provide SMECO members taking SOS with a 100% renewable (or "green") option. The Retail Energy Supply Association ("RESA")[1] submitted comments in opposition to SMECO's proposed Rider SOS-G and participated in the administrative meeting on August 5, 2020, opposing SMECO's proposal. The Commission deferred the matter to the August 19, 2020 administrative meeting.

RESA submits these supplemental comments related to statutory issues that arose during the August 5 meeting. In sum, SMECO's Rider SOS-G is not consistent with the plain language of § 7-510(c)(8)(i) or with the Electric Customer Choice and Competition Act of 1999, PUA § 7-501 *et seq*. ("Choice Act") as a whole and, therefore, RESA requests that the Commission reject the proposed Rider SOS-G.

I. SMECO's assertion that it is authorized to use a blended portfolio to provide a 100% renewable option to satisfy its customers' "demand" under § 7-510(c)(8)(i) is inconsistent with long-standing Maryland precedent regarding statutory interpretation.

In 2004, the Commission authorized SMECO to procure the electricity needed to serve its SOS load through the use of a blended portfolio.[2] In 2007, the General Assembly adopted

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.
[2] *See* Letter Order (June 17, 2004); *see also In the Matter of the Inquiry Into the Provision of Standard Offer Service by Southern Maryland Electric Cooperative, Inc.*, Case No. 8985, Order No. 79503 (Sept. 29, 2004).

PUA § 7-510(c)(8)(i) which, other things, authorized cooperatives that were supplying their SOS load through a blended portfolio to continue to do so "as needed to meet demand in a cost effective manner." Section 7-510(c)(8)(i) reads as follows:

> An electric cooperative that as of July 1, 2006 supplied its standard offer service load through a portfolio of blended wholesale supply contracts of short, medium, and long terms, and other appropriate electricity products and strategies, ***as needed to meet demand in a cost-effective manner***, may choose to continue to use a blended portfolio:
>
> 1. as approved and modified by the electric cooperative's board of directors; and
>
> 2. with appropriate review for prudent cost recovery as determined by the Commission.[3]

(Emphasis added.) While the Commission has held that SMECO's SOS is designed to meet customer's kilowatt demand in a cost-effective manner, Rider SOS-G would allow members to pay an additional premium for SMECO to purchase RECs to match their electricity usage. SMECO is already required to purchase RECs to cover the percentages of electricity for purposes of Maryland's renewable energy portfolio standard (RPS"). The RECs that SMECO would purchase under Rider SOS-G are in excess of the RPS percentages. In short, SMECO seeks to use a blended portfolio to provide a value-added renewable product at a cost separate from what is required to meet the demand of its SOS customers. It is not so much an SOS product as it is a competitive product, as explained below. In the very least, it is an alternate SOS product. Either way, SMECO's proposal cannot be reconciled with § 7-510(c)(8)(i).

Instead, SMECO seeks to expand the statutory requirement that its portfolio be constructed to meet its customers' "demand" in a "cost-effective manner." At the August 5, 2020 administrative meeting, counsel for SMECO suggested that "demand" should be defined broadly to include customers' requests and preferences regarding their electricity product. SMECO's strained interpretation would allow SMECO to provide virtually any type of electricity-related value-added product (and possibly even non-electricity related value added products) unrelated to or exceeding its customers' electricity demand (*e.g.,* kW) merely because their customers asked for it, and even if the General Assembly intended for the competitive retail electricity market to provide the same or similar products. As explained below, SMECO's proposal, including its interpretation of "demand," is contrary to long-standing rules of statutory interpretation in Maryland and must be rejected.

A. SMECO's proposed definition of "demand" is contrary to the term's general meaning in the energy industry and its usage within § 7-510(c).

[3] *Id.*

Maryland Courts have consistently held that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature."[4] To determine the General Assembly's purpose or policy, the Commission's inquiry begins with the statutory text:

> we look first to the language of the statute, giving it its natural and ordinary meaning. We do so on the tacit theory that the General Assembly is presumed to have meant what it said and said what it meant. If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written.[5]

Also, "the meaning of the plainest language is controlled by the context in which it appears."[6] As the Court of Appeals explained in *Lonaconing Trap Club v. Inc. Md. Dep't of the Env't.*:

> This Court reads the statute as a whole to ensure that none of its provisions are rendered meaningless. '[We] neither add nor delete language so as to reflect an intent not evidenced in the plain language of the statute; nor [do we] construe the statute with forced or subtle interpretations that limit or extend its application.' Additionally, '[w]e avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense.'[7]

SMECO's suggestion that "demand" should be broadly interpreted to mean something more than electricity demand (e.g., kW) is inconsistent with the term's usage in the field of electric regulation and within the statute itself. In the electricity industry, "demand" is commonly understood to mean customers' electricity requirement, on an individual or aggregate basis, expressed in terms of kW ("kW demand"). Other references to "demand" in PUA § 7-510 clearly indicate that the term refers to kW demand, not customer preferences or requests as SMECO contends. For example, PUA § 7-510(c)(4)(ii)(2)(c) provides:

> By regulation or order, as part of the competitive process, the Commission shall require or allow the procurement of cost-effective energy efficiency and conservation measures and services with projected and verifiable energy savings to offset anticipated demand to be served by standard offer service, and the imposition of other cost-effective demand-side management programs.[8]

Likewise, PUA § 7-510(c)(6) provides:

> In order to meet long-term, anticipated demand in the State for standard offer service and other electricity supply, the Commission may require or allow an investor-owned electric company to construct, acquire, or lease, and operate, its

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[4] *Donlon v. Montgomery Cty. Pub. Schs*, 460 Md. 62, 75 (2018) (quoting *Wash. Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 618-19). *See also Severstal Sparrows Point, LLC v. PSC of Md.,* 194 Md. App. 601, 616 (Md. Ct. Spec. App. Sept. 17, 2010).
[5] *Ben-Davies v. Blibaum & Assocs., P.A.*, 457 Md. 228, 246, 177 A.3d 681, 691, (2018).
[6] *Kaczorowski v. Mayor and City Council of Baltimore*, 309 Md. 505, 514 (1987).
[7] *Lonaconing Trap Club v. Inc. Md. Dep't of the Env't*, 410 Md. 326, 339 (2009).
[8] PUA § 7-510(c)(4)(ii)(2)(c).

> own generating facilities, and transmission facilities necessary to interconnect the generating facilities with the electric grid, subject to appropriate cost recovery.[9]

Applying SMECO's proposed broad definition of "demand" to mean, essentially, "whatever our customers want" for purposes of § 7-510(c)(8)(i) would render the aforementioned statutory provisions meaningless. Alternatively, a construction of § 7-510(c) that assumes the General Assembly used the same term to mean different things within the same subsection is neither reasonable nor logical.

B. SMECO's proposed construction of PUA § 7-510(c)(8)(i) is inconsistent with the statutory scheme adopted by the General Assembly in the Choice Act.

Moreover, SMECO's construction of PUA § 7-510(c)(8)(i) is inconsistent with the statutory scheme adopted by the General Assembly in the Electric Customer Choice and Competition Act of 1999 ("Choice Act"). As the Court emphasized in *Ben-Davies v. Blibaum & Assocs., P.A.*, the appropriate context for statutory construction is not limited to the statute itself, but extends to related statutes and the overarching statutory scheme adopted by the General Assembly:

> As this Court has stated, because it is part of the context, related statutes or a statutory scheme that fairly bears on the fundamental issue of legislative purposes or goal must also be considered. Thus, not only are we required to interpret the statute as a whole, but, if appropriate, in the context of the entire statutory scheme of which it is a part.[10]

Likewise, in *Severstal Sparrows Point, LLC, v. PSC of Md.*, the Court held that statutory language should be construed in a manner consistent with the General Assembly's underlying purpose, aim or policy and with other provisions enacted by the General Assembly:

> [T]he plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope.[11]

The General Assembly, in enacting the Choice Act, mandated the creation of "competitive retail electricity supply and electricity supply services markets" and the deregulation of "generation, supply, and pricing of electricity."[12] The General Assembly defined the role of electric distribution utilities, including electric distribution cooperatives like SMECO, at PUA § 7-506.[13] SMECO's role is to provide distribution services, maintain a reliable distribution system, connect customers and deliver electricity on behalf of suppliers and provide SOS pursuant to § 7-510(c).[14] SOS is defined as "[e]lectricity supply purchased from a customer's electric

[9] PUA § 7-510(c)(6).
[10] *Ben-Davies v. Blibaum & Assocs., P.A.*, 457 Md. 228, 247 (2018).
[11] *Severstal*, 194 Md. App. 601, 617 (quoting *Lockshin v. Semsker*, 412 Md. 257, 274-76).
[12] PUA § 7-504(2)-(3).
[13] PUA § 7-506.
[14] *Id.*

company…"[15] Nowhere did the General Assembly provide for any electric company, including electric cooperatives, to offer REC products or other value-added products beyond SOS – the electricity supply – and that are not needed to serve customers' SOS demand.

As Staff counsel noted at the August 5 administrative meeting, SOS was always intended to be a "vanilla" product for all utilities – a standard, "backstop" service for consumers who do not participate in the competitive market for any reason articulated in § 7-510(c)(2)(i)-(vi).[16] Likewise, the Commission and most, if not all, stakeholders have always interpreted SOS as a "vanilla" product except in limited circumstances largely driven by specific statutes. A customer that wanted value-added products, or a lower price, or both, could contract for those products and services in the competitive market. This understanding of SOS is in line with the structure of § 7-510(c), which consistently frames the procurement and delivery of SOS in terms of necessity and cost.

Allowing SMECO to expand the scope of SOS to include a value-added REC product is inconsistent with the Choice Act's statutory scheme which, on one hand, identifies the role of utilities as the provider of SOS and distribution services while, on the other hand, creates and establishes a competitive retail electricity market to benefit customers by way of lower prices and other products such as renewable energy and associated RECs. SMECO's Rider SOS-G would begin to unravel the current SOS structure by allowing utilities to offer value-added products beyond merely SOS and distribution services, in contrast to the language in the Choice Act and the Commission's longstanding implementation thereof.

Further, SMECO's attempt to expand SOS, and to offer value-added products, blurs the provisions in the Choice Act and related COMARs that hold utilities and retail electric suppliers to different standards. Under the Choice Act, third-party suppliers are required to obtain an electricity supplier license and abide by the Commission's consumer protection regulations.[17] These regulations, codified at COMAR 20.53, include rules regarding marketing, information disclosures, contract requirements, and more.[18] Here, SMECO seeks to offer a 100% renewable product that would directly compete with more than a dozen products offered by other retail electric suppliers within its distribution territory without complying with the same licensing and consumer protection regulations applicable to those suppliers.[19]

Finally, SMECO's construction of PUA § 7-510(c)(8)(i) would undermine the Commission's encouragement of retail electric competition. While SMECO asserts in its filing that "members have inquired with SMECO about the availability of a green power supply option," the General Assembly has already determined that the competitive market presents the

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[15] Md. Code 7-510(c)(2). *See also* Md. Code § 7-501n), defining SOS as "electric service that an electric company must offer to its customers under § -510(c) of this subtitle."
[16] *See, e.g., Severstal Sparrows Point, LLC v. Public Service Com'n of Maryland*, 194 Md. App. 601, 604-05, 5 A.3d 713 (2010) (holding that "the law was written to obligate the electricity utilities such as BGE to continue to provide 'backstop' electricity supply, known as [SOS], to consumers who chose not to shop for their electric supply or, for whatever reason, could not obtain electricity on the open market.").
[17] *See generally* COMAR 20.53.06 and COMAR 20.53.07.
[18] *Id.*
[19] *See* MD. ELECTRIC CHOICE, https://www.mdelectricchoice.com. For information regarding renewable offerings in the SMECO service territory, use the "refine results" tab to filter and view only the "renewable" offerings in the SMECO service territory. As of July 28, 2020, there are at least a dozen renewable energy offerings from which SMECO members may choose.

appropriate mechanism to fulfill this need. The Commission has recently stated that "Retail choice has existed for almost two decades in Maryland. We support retail choice, both as consistent with Maryland's statutory construct and because of our belief that competitive, transparent, and customer-friendly retail markets will benefit customers."[20] As explained at the August 5 administrative meeting, allowing SMECO's proposed Rider SOS-G would force competitive suppliers to compete on an uneven playing field against a utility that enjoys legacy advantages and guaranteed cost recovery with no required margin. By contrast, competitive suppliers must recover all of their costs and their margin within the prices they charge. Not only should the Commission reject SMECO's proposal, but RESA recommends, as it did in its initial comments, that SMECO be required to help educate its members about their shopping opportunities and the products available on the competitive market whenever its members contact SMECO about renewable or other energy products.

II. In the absence of statutory authority, the Commission does not have discretionary authority to approve SMECO's use of a blended portfolio in a manner not authorized by PUA § 7-510(c)(8)(i).

Per PUA § 2-112(b), the Commission's powers are limited to those "specifically conferred by law" and "the implied and incidental powers needed or proper to carry out its functions."[21] While PUA § 2-112(c) provides that the Commission's powers "shall be construed liberally,"[22] its exercise of power – incidental or otherwise – cannot exceed the scope of the statute it seeks to implement or enforce.

In *Severstal*, the Maryland Court of Special Appeals held that "the scope of the [Commission's] authority to regulate SOS is confined to the standards set forth in Section 7-510(c)."[23] The Court also emphasized that the Commission's "implied and incidental powers" under PUA § 2-112(b)(2) did not grant the Commission independent, discretionary authority to act in the absence of a statutory mandate: "[I]t would be contrary to the spirit of statutory interpretation to read such a 'gap-filling' provision as granting powers otherwise not granted in the PUC Article."[24]

In *Severstal,* the Court reversed the Commission's attempt to implement temporary rate caps for certain customers following an SOS auction and shift a portion of the SOS rate to other customers through an increase in distribution rates – finding that these actions exceeded the scope of the Commission's regulatory authority under § 7-510(c).[25] Here, SMECO asks the Commission to issue an order approving a value-added REC product that exceeds the scope of SMECO's authority to provide SOS to meet its customers' demand in a cost-effective manner. There is nothing in the statutes that permits SMECO's Rider SOS-G and doing so is inconsistent with the structure of the Choice Act and beyond the Commission's authority to approve. Accordingly, RESA asks that the Commission reject SMECO's proposal.

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[20] *In the Matter of Transforming Maryland's Electric Distribution Systems to Ensure that Electric Service is Customer-Centered, Affordable, Reliable, and Environmentally Sustainable in Maryland*, PC-44, Notice at 10 (Jan. 31, 2017) (citing the Choice Act).
[21] PUA § 2-112(b)(1)-(2).
[22] PUA § 2-112(c).
[23] *Severstal*, 194 Md. App. 601, 626.
[24] *Id.* at 628.
[25] *Id.* at 628-29.

RESA appreciates the opportunity to submit these supplemental comments in response to SMECO's Rider SOS-G proposal. Because SMECO's proposal conflicts with the Choice Act and SMECO's members already have competitive renewable energy offerings available to them, RESA requests that the Commission reject SMECO's proposed Rider SOS-G.

III. SMECO should rely on the competitive market for value added products.

In addition to the issues expressed above, RESA recommends that SMECO do more to promote the competitive market and to educate its customers about retail choice. RESA has previously suggested that SMECO refer inquiring customers to the Commission's new website, www.mdelectricchoice.com.

At the August 5 meeting, there was much discussion about SMECO providing information about its proposed Rider SOS-G to its customers. In RESA's view, such information cannot be presented "objectively" and would violate Maryland's prohibition against marketing an SOS product and showing a preference for utility services. Even assuming that SMECO presents its offer alongside retail supplier offers, as was discussed, this does not cure the violation and actually presents more issues such as how the offers are presented, the descriptive language and order of presentation that is used, and so forth. In reality, providing SMECO's "alternate SOS" or value-added products alongside suppliers' would establish SMECO as an alternative provider and result in marketing its SOS product(s) against other offers in the market, which is prohibited by law.

Currently, SMECO includes on its customers' bills a calculation of the difference between what the customer's supplier is charging versus what the customer would have paid on SOS.[26] One problem with SMECO's bill presentation is that the customer is receiving inaccurate information if the bill information disregards what the full competitive offer might have included – such as a value-added component like renewable energy and associated RECs. SMECO's bill presentation would appear to constitute the marketing of, or showing a preference towards, SOS which is prohibited by law.[27] Regardless of how "objective" it is intended to be presented, the bill information promotes utility services and discourages retail choice. In this case, to offer a value-added product, or an alternative SOS product, that closely resembles what Maryland statutes and regulations anticipated would be offered by retail suppliers, should not be allowed.

Finally, there was discussion at the August 5 meeting about the interplay between the goals of promoting retail choice and the promoting renewable energy. There is no dispute, however, that SMECO and all suppliers must adhere to Maryland RPS requirements which are established by the General Assembly, and that suppliers are offering renewable products in SMECO's service territory. Therefore, rejecting SMECO's proposed Rider SOS-G does not result in favoring one policy goal over another; rather, it promotes both.

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[26] *See* https://www.smeco.coop/account/about-the-smeco-bill-choice. The bill information that SMECO provides goes beyond the Supply Price Comparison information that the Commission approved for investor-owned utilities in Case No. 9228. *In the Matter of a Review of the Price to Compare Published by Maryland's Investor-Owned Electric Utilities*, Case No. 9228, Order No. 84089 (June 8, 2011).
[27] *See* PUA § 7-505(b)(3)(i).

IV. SMECO's proposal, if allowed, opens the door for all utilities to present value-added products and alternative SOS products.

In RESA's view, SMECO's proposal, if allowed, sets a dangerous precedent and cannot be mitigated with marketing disclaimers and so forth. There would be nothing to prevent utilities from filing value-added options and alternative SOS offers virtually identical to the offers from suppliers. This result would thwart the development of retail choice and the goals it was intended to attain for customers. Moreover, if the word "demand" is interpreted as SMECO advocates, any time members want a product, they can approach SMECO and SMECO can decide whether to offer it. That result is not what the Electric Choice Act intended.

RESA appreciates the opportunity to present these supplemental comments and will be available at the August 19, 2020 administrative meeting to answer any questions the Commission may have.

Sincerely,

/s/ Brian R. Greene

Brian R. Greene

c: Mark A. MacDougall (mark.macdougall@smeco.coop)
Lloyd J. Spivak (lloyd.spivak@maryland.gov)
Michael A. Dean (michael.dean@maryland.gov)
Jacob M. Ouslander (jacob.ouslander@maryland.gov)
Benjamin T. Hance (benjamin.t.hance@gmail.com)