LEGAL AID SOCIETY

PURSUING JUSTICE RESTORING HOPE

EILEEN L ORDOVER
(502) 614-3125
EOrdover@laslou.org

November 1, 2010

RECEIVED

NOV 01 2010

PUBLIC SERVICE
COMMISSION

<u>Via Hand-Delivery</u>
Mr. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

Re: Case No. 2010-00146 -- An Investigation of Natural Gas Retail Competition Programs

Dear Mr. Derouen:

Enclosed for filing, please find an original plus ten (10) copies of the Post-Hearing Brief of Association of Community Ministries, Inc., in the above-referenced matter.

Please confirm your receipt of this filing by placing the stamp of your office with the date received on the enclosed additional copy of the document.

Thank you for your assistance in this matter. Please contact me if you need further information.

Very truly yours,

Eileen Ordover

Eileen Ordover
Attorney for ACM

cc: Parties of record

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF NATURAL GAS RETAIL COMPETITION PROGRAMS	))	CASE NO. 2010-00146

POST-HEARING BRIEF OF ASSOCIATION OF COMMUNITY MINISTRIES, INC.

Filed: November 1, 2010

I. INTRODUCTION

The Commission has opened this Investigation in order to study and evaluate existing natural gas retail competition programs, towards the ultimate goal of determining (1) "if benefits could be derived from these programs," and (2) "whether natural gas retail competition programs could be crafted to benefit Kentucky consumers."[1] As part of this work, the Commission is to consider the impact of retail competition on existing customers.[2] The Association of Community Ministries, Inc. (ACM) has intervened in order to assist the Commission in examining the impact on one particular, large segment of existing Kentucky natural gas customers: residential customers with low incomes.

The record developed during the course of this proceeding makes it clear that retail competition is far more likely to seriously harm these customers than it is to benefit them in any way: low-income customers are already struggling to pay their gas bills, as are the voluntary agencies that assist them; retail competition will likely raise those bills; and Kentucky law will not protect low-income customers from the harm to follow, lacking the kind of energy assistance mandates that other states have created or strengthened in conjunction with retail competition. The confluence of these three factors makes retail competition a potential disaster for ACM's constituency. Disconnections amid impossible choices between heat and food, heat and medication, heat and rent, are easily foreseeable.

II. ARGUMENT

A. Residential Retail Competition Would Raise Energy Bills That Are Already Unaffordable.

The low-income customers ACM's member agencies assist in Louisville already struggle with home energy costs, as do those served by the Community Action Council for Lexington-

---

[1] Kentucky Public Service Commission, Case No. 2010-00146, Order of April 19, 2010 at 4.

[2] *Id.*

Fayette, Bourbon, Harrison and Nicholas Counties, Inc. (CAC), another intervenor in this proceeding. In fiscal year 2009-2010, the number of requests for ACM members' help to pay utility bills increased by 30%, and even while increasing their total utility assistance payments to Louisville Gas and Electric by 20%, ACM agencies were forced to turn away needy customers due to insufficient funds.[3] CAC, which administers the federally-funded Low Income Home Energy Assistance Program (LIHEAP) in its territory, likewise lacks the resources to help all customers who cannot afford their energy costs.[4] Existing need simply outstrips the ability of ACM and CAC to meet it. Predictably, then, any public policy decision that would raise what for so many are already barely- or unaffordable natural gas costs will harm Kentucky's low-income community. As discussed below, however, higher energy bills appear to be exactly what low-income customers can expect from residential retail competition.

1. <u>A high risk of increased natural gas bills for all residential customers is inherent in the implementation and operation of retail competition.</u>

Though the Commission does not have before it any particular proposal for accomplishing retail competition, these proceedings have surfaced the myriad costs that may potentially find their way into the bills of low-income customers under competition, regardless of whether they continue to buy supply from a local distribution company (LDC) or contract with a marketer. These include, e.g., transition costs, stranded costs, uncollectible supplier expenses, increased billing costs, marketing costs, consumer education costs, customer-handling costs and

[3] Testimony of Marlon Cummings On Behalf Of The Association Of Community Ministries, Inc. Filed June 18, 2010 (hereafter "Cummings Testimony") at 4.

[4] Direct Testimony of E. Burch On Behalf Of CAC Filed June 24, 2010 (hereafter "Burch Testimony") at 2. There is no reason to believe that low-income customers elsewhere in Kentucky are faring any better.

the costs of regulatory proceedings and enforcement.[5] Marketers participating in this proceeding appear to urge that as many of these costs as possible be shifted away from them, including by spreading the costs among both migrating and non-migrating residential customers.[6] In addition, as marketers pursue and woo away from the LDC customers with the largest volume of business and largest margins, leaving with the LDC customers with less attractive loads, the LDC's supply costs for these remaining customers can be expected to rise – further adding to the natural gas bills of all low-income customers.[7]

2. Actual experience with retail competition shows that residential customers pay more under competition regimes.

The record developed during the course of this investigation contains much data on residential costs in jurisdictions that have implemented retail competition. There is also significant data on Kentucky's one experiment with residential retail competition, Columbia Gas of Kentucky's CHOICE pilot program. This record does not bode well for Kentucky's low-income natural gas customers, who already struggle with energy bills despite the fact that average residential natural gas prices in the state are not only lower than the national average, but lower than both the average marketer price and the overall average price paid by residential

[5] See, e.g. Testimony of J. Clay Murphy Filed June 21, 2010 (hereafter "Murphy Direct") at 6-7, 28-39; Testimony of Mark A. Martin Filed June 22, 2010 (hereafter "M. A. Martin Testimony") at 23; Direct Testimony Of Nancy Brockway On Behalf Of Intervenor AARP Filed June 21, 2010 (hereafter "Brockway Direct") at 23, 25; Direct Testimony Of Teresa L. Ringenbach On Behalf Of The Retail Energy Supply Association Filed June 21, 2010 (hereafter "Ringenbach Testimony") at 17-19.

[6] See, e.g. Rebuttal Testimony of J. Clay Murphy Filed September 22, 2010 (hereafter "Murphy Rebuttal") at 15-16, 23; Ringenbach Testimony at 18-19; Interstate Gas Supply, Inc., Southstar Energy Services, LLC's and Vectren Source's Response To Data Request of the Commission Staff, Filed September 7, 2010.

[7] Brockway Direct at 16; Hearing Testimony of Glenn R. Jennings; Hearing Testimony of J. Clay Murphy.

customers in at least eight states with competitive retail markets, including Georgia, Ohio, Florida, Maryland, New Jersey, New York, Pennsylvania and Virginia.[8]

In Georgia, for example, in the wake of retail competition the average residential charge per Mcf, which previously tracked fairly closely the national average, has climbed and remains significantly above that average.[9] Ohio's average residential charge per Mcf, too has risen in the wake of competition, surpassing the national average sometime between 2004 and 2005 and resulting in a $796 million premium paid by residential customers between 2005 and 2008.[10] Returning to Georgia, price comparisons between LDC Atmos and the marketers with a large market share have shown that for the past five calendar years, marketer rates were higher on an annual basis.[11] In Illinois, a study by the Citizens Utility Board, created by statute, found that between 2003, when retail competition began, and June 2010, 92% of the plans offered by marketers resulted in losses to customers over the life of their contract in comparison to what the respective customers would have paid had they purchased gas supply from their LDC.[12] The average loss was $655; the largest was over $1,300.[13]

Here in Kentucky, over its ten-year life Columbia's CHOICE pilot has cost migrating customers $17 million more than they would have paid had they remained with Columbia as

---

[8] See Staff Hearing Exhibits 1 and 2. The eight competitive states tracked in these exhibits are Florida, Georgia, Maryland, New Jersey, New York, Ohio, Pennsylvania and Virginia.

[9] Murphy Rebuttal at 5 – 6.

[10] *Id.;* Rebuttal Testimony of Pamela L. Jaynes Filed September 22, 2010 (hereafter "Jaynes Rebuttal") at 17-18 and Exhibit 1.

[11] M.A. Martin Testimony at 14.

[12] Brockway Direct at 16 – 17; M.A. Martin Testimony at 15; Testimony of Pamela L. Jaynes Filed June 21, 2010 (hereafter "Jaynes Direct") at 21.

[13] Brockway Direct at 17.

their supplier.[14] During the twelve months covered by Columbia's 2010 "Consumer Choice Annual Report," this meant an average per customer loss of $417.[15] For a family of four living at the 2009 federal poverty level, this would be the equivalent of almost one-quarter of a month's income; for a single individual, almost one-half.[16]

Beyond this data, reports from other states should serve as warnings that retail competition places low-income customers at great risk of life without heat and hot water – whether because of disconnection for nonpayment in the wake of higher bills, or because of scrimping in anticipation of being unable to pay such bills. Whether traceable to legal but disadvantageous contract terms,[17] unscrupulous marketing tactics,[18] complicated and poorly-understood supplier contracts,[19] "choices" that turned out to be poor ones due to the vicissitudes of the market or higher LDC rates brought about by the implementation of competition, or some combination thereof, retail competition will make low-income customers vulnerable to extreme hardship.

B. Unlike Other States Embracing Retail Competition, Kentucky Law Lacks Essential Protections For Low-Income Customers.

Recognizing that retail competition places low-income customers in jeopardy, other states embracing retail competition have mandated as part of this sea change new or strengthened

[14] Columbia Gas of KY, Inc. Response To Second Information Request of ACM Dated August 20, 2010, Data Request No. 2-003; Jaynes Direct at 20.

[15] Jaynes Direct at 20.

[16] See 74 Fed. Reg. 4199 – 4201 (January 23, 2009) (setting 2009 poverty guidelines for 48 contiguous states at, $10,830 in annual income for a family of one and $22,050 for a family of four).

[17] See, e.g. Brockway Direct at 12; Burch Testimony at 7.

[18] See, e.g. Brockway Direct at 5 – 11; Cummings Testimony at 5; Jaynes Direct at 23; Jaynes Rebuttal at 23 – 25.

[19] See, e.g. Brockway Direct at 5, 13; Burch Testimony at 7.

universal service funds and energy assistance programs. Indeed, universal service funds and assistance programs are central features of retail competition in Ohio, Pennsylvania and Illinois, whose programs have been placed before the Commission for study by parties to this proceeding.[20] These legal mandates stand in stark contrast to current Kentucky law.

1. Ohio

In Ohio – the subject of much testimony in this proceeding – Public Utility Commission of Ohio (PUCO) regulations protect migrating customers who cannot pay their supply bill from losing all access to natural gas service: disconnections for nonpayment are allowed only for "nonpayment of regulated services provided by the utility company,"[21] and natural gas utilities may not refuse service or disconnect service to any applicant or customer for "[f]ailure to pay any nontariffed service charges...."[22] Low-income gas customers living at or below 150% of the federal poverty line must be offered a Percentage of Income Payment Plan (PIPP), the terms and benefits of which are detailed in PUCO regulations.[23] Also in the regulations are protections and relief for "graduates" of a PIPP, including opportunities to earn credits on outstanding

---

[20] For additional state examples, see Cummings Testimony Exhibit B and the LIHEAP Clearinghouse on-line state library on utility restructuring, public benefits and universal service funds, www.liheap.ncat.org/dereg.htm. In bringing such laws and programs to the Commission's attention, ACM does not maintain that they have necessarily resolved all of the problems faced by low-income consumers in the states in question, or would do so if adopted in Kentucky.

[21] O.A.C. § 4901:1-18-03(H). See also O.A.C. § 4901:1-18-04(B) (minimum payment necessary to avoid disconnection procedures not to exceed portion of bill representing "a previous balance for regulated services provided by the utility company"). PUCO recently reviewed, renumbered and revised many of its regulations, effective November 1, 2010. All references herein are to the revised regulations, as published in the *Register of Ohio*, www.registerofohio.state.oh.us, pursuant to the Ohio Administrative Procedure Act (Ohio Revised Code Chapter 119).

[22] O.A.C.§ 4901:1-18-10(D).

[23] O.A.C. §§ 49:01:1-18-12 – 4901:1-18-17. In 2010, 150% of the federal poverty line for a single individual means annual income of $16,245; for a family of four, $33,075. See 75 Fed. Reg. 45628 – 45629 (August 3, 2010).

arrearages.[24] Delinquent customers who are not eligible for a PIPP must be offered extended payment plan options meeting certain requirements.[25] The PIPP is funded through a rider embedded in gas distribution charges.[26]

2. Pennsylvania

In Pennsylvania, the law setting standards for structuring natural gas competition provides that its public utility commission "shall ensure that universal service and energy conservation policies, activities and services are appropriately funded and available in each natural gas distribution service territory," and that "[e]ach natural gas distribution company shall set forth in its restructuring filing an initial proposal to meet its universal service and energy conservation obligations."[27] The statute defines "universal service and energy conservation" as "[p]olicies, practices and services that help residential low-income retail gas customers and other residential retail gas customers experiencing temporary emergencies…to maintain natural gas supply and distribution services," including "retail gas customer assistance programs, [and] termination of service protections…."[28] Commission regulations state that goals of universal service and energy conservation programs are, *inter alia*, "[t]o protect consumers' health and safety by helping low-income customers maintain affordable natural gas service," and "[t]o provide for affordable natural gas service by making available payment assistance to low-income customers."[29] The regulations also provide for three-year universal service and energy

---

[24] See O.A.C. § 4901:1-18-16.

[25] See O.A.C. § 4901:1-18-05.

[26] See two-page document entitled "Ohio PBF/USF History, Legislation, Implementation" at 2, included in Exhibit B of Cummings Testimony.

[27] 66 Pa.C.S. § 2203(8), (9).

[28] 66 Pa.C.S. §2202.

[29] 52 Pa. Code § 62.3(b).

conservation plans, detailed annual reports, and periodic independent evaluations of program impact.[30] Universal service and energy conservation programs are funded through non-bypassable distribution service charges.[31] Utilities must spend what is necessary to meet enrollment levels specified in Commission filings.[32]

3. <u>Illinois</u>

Illinois has taken a somewhat different approach, creating through legislation a Supplemental Low-Income Energy Assistance Fund (SLEAF) and setting the monthly charges to be collected to support it.[33] All classes of customers receiving natural gas distribution service contribute.[34] SLEAF monies are used in part to fund the Percentage of Income Payment Plan mandated by the Illinois legislature effective January 1, 2009.[35]

Kentucky law, by comparison, will offer low-income customers no protection from the added hardship retail competition will cause. Far from the above-described legal mandates, Kentucky law simply authorizes utilities to propose home energy assistance as part of a demand-side management program, and/or establish a voluntary energy cost assistance fund through

---

[30] See 52 Pa. Code §§62.4 – 62.6.

[31] See LIHEAP Clearinghouse document entitled "Pennsylvania PBF/USF History, Legislation, Implementation," included in Exhibit B of Cummings Testimony.

[32] See LIHEAP Clearinghouse document entitles "State PBF/USF History, Legislation, Implementation Pennsylvania" at 3, included in Exhibit B of Cummings Testimony.

[33] I.C.S. 20/13(a).

[34] I.C.S. 20/13(b). Residential customers pay $0.48 per month, non-residential customers using less than 4,000,000 therms of gas during the previous calendar year pay $4.80 per month, and non-residential customers using 4,000,000 or more therms during the previous year pay $360.00 per month.

[35] See I.C.S. 201/18.

which to solicit customer contributions.[36] Even without retail competition, the resulting funds are inadequate to meet community need, even when combined with federal LIHEAP funds.[37]

Under these circumstances, it is essential that the Commission take into account the universal service funds and low-income assistance programs that are key components of retail competition elsewhere. Equally if not more importantly, the Commission must give careful consideration to the consequences of advancing retail competition in a state that, like Kentucky, lacks comprehensive energy assistance programs and protections for low-income customers, as well as the non-discretionary funding mechanisms required to support them.[38]

C. <u>**The Record Developed In This Investigation Offers No Good Reason For Proceeding With Retail Competition In Light Of The Predictable Harm To Low-Income Customers.**</u>

As detailed above, proceeding with retail competition will seriously and predictably harm Kentuckians with low incomes. It will do so without affording any benefit to any other residential consumers (who will also face the higher costs discussed above) because, for reasons explained at length in the expert testimony of Nancy Brockway, "[s]upply competition for gas cannot be achieved in a way that benefits customers."[39] And it will do so while costing the Commonwealth untold resources, on an ongoing basis, to support the role urged for the

[36] K.R.S. 278.285(4), 278.287.

[37] See discussion *infra* at 2.

[38] The natural gas retail competition bill introduced during the 2009 session of the Kentucky General Assembly did not include these components. See Kentucky General Assembly 2009 Regular Session, HB542.

[39] Brockway Rebuttal at 10-11. See also *id.* at 9 ("Requiring residential customers to pay for the establishment of a deregulated supply 'market' would be a gift to the suppliers, and of no benefit to the customers.").

Commission in a competitive retail market.[40] Competition proponents urge the Commission to embrace residential competition nonetheless, suggesting that organizations such as ACM and CAC protect low-income customers by helping them form buyers clubs to purchase gas competitively,[41] claiming that the opportunity to choose a supplier is an important enough value in and of itself to justify retail competition, and contending that there is a groundswell of support for competition among residential customers. The record here demonstrates that they are wrong on all counts.

First, as Jack Burch of CAC explained at length in both his pre-filed and hearing testimony, CAC has already tried aggregating low-income and other customers for collective purchasing power and savings, without success. CAC created the Community Action Council Buyers Club, Inc. in Columbia's service territory following approval of the CHOICE pilot, and closed it after two and one-half years of operation, finding it near impossible to offer a fair price to consumers under fair terms.[42]

---

[40] Parties to this proceeding urge that the Commission must, *inter alia*, (1) approve, monitor, oversee and evaluate the effectiveness of all retail choice programs (M.A. Martin Testimony at 3 – 4; Direct Testimony Of B. Mitchell Martin On Behalf Of Duke Energy Kentucky Filed June 21, 2010 at 9); (2) certify suppliers (e.g. Direct Testimony of Gregory Collins Filed June 21, 2010 at 12); (3) "create an office or staff for the competitive community" (Ringenbach Testimony at 8); (4) develop and enforce rules for competitively neutral practices, marketing and consumer protection (*id.* at 7); (5) play "a key role in Consumer education by helping customers understand their competitive options, articulating how to evaluate competitive offers, understanding their rights of supplier selection and rescission, and instructing them on how to switch suppliers" (*id.* at 10); and (6) develop and enforce a code of conduct for marketers (M.A. Martin Testimony; Jennings Testimony at 4 – 5; Rebuttal Testimony of M. Howard Petricoff Filed September 21, 2010 at 8; B.M. Martin Testimony at 9).

[41] See Hearing Transcript, cross examinations of Marlon Cummings and Jack E. Burch by counsel for Retail Energy Suppliers Association and Proliance.

[42] Burch Testimony at 6; Response of Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc. To First Information Request of Commission Staff, Data Request 3.

Second, participation rates in "choice" programs elsewhere are quite low unless the LDC exits the merchant function, *forcing* residential customers to buy from a competitive supplier.[43] Turning to Kentucky, the Matrix survey of Columbia customers cited for the proposition that residential customers want the opportunity to choose even if this means that at the end of the day they do not save money does not support this assertion.[44] While 74% of CHOICE participants surveyed agreed that they would still participate in order to choose their supplier regardless of whether or not they saved money, only seventy people were questioned – meaning that only fifty-two so agreed.[45] This is a rather small sample from which to conclude that Kentucky customers want retail competition regardless of the cost. Furthermore, almost half of the respondents did not know whether or not they had saved money, let alone whether they had actually lost money by migrating away from Columbia.[46] Eighty percent, or 56 of the respondents, said that they enrolled in CHOICE because they believed they would be guaranteed lower rates.[47]

Finally, not a single residential customer filed written comments or spoke at the public hearing on behalf of "choice." The group known variously as Kentucky Consumers for Energy Choice[48] and Kentucky Consumers for Energy Competition,[49] which filed rebuttal testimony on

---

43 Brockway Direct at 26 – 27; Brockway Rebuttal at 9; Jaynes Direct at 4 – 5; Jaynes Rebuttal at 4 – 6.

44 This document, entitled *Final Report Columbia Gas of Kentucky Customer CHOICE Survey* (hereafter "Matrix Report") is part of the response filed by Columbia Gas of Kentucky in this proceeding to the Second Request For Information served upon it by Interstate Gas Supply *et al.*

45 Matrix Report at 7.

46 *Id.* at 18.

47 *Id.* at 17.

48 Rebuttal Testimony of Ellen Williams Filed September 22, 2010.

behalf of Interstate Gas Supply (IGS), Southstar Energy Services and Vectren Source, was created by natural gas marketers for the express purpose of promoting their agenda before the General Assembly.[50] Its activities are funded by IGS Energy, Inc.[51]

CONCLUSION

For the foregoing reasons, the final report of this Investigation should conclude that natural gas retail competition will not benefit Kentucky consumers, but will harm them, and reject residential retail competition in the strongest possible terms.

Respectfully submitted,

Eileen Ordover
Legal Aid Society
416 W. Muhammad Ali Blvd., Suite 300
Louisville, KY 40202
(502) 584-8014, phone
(502) 584-1254, fax
eordover.laslou.org
Counsel for ACM

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2010, a true and correct copy of the foregoing document was sent, via U.S. Mail, postage prepaid, to all individuals listed on the attached Certificate of Service.

Eileen Ordover

---

[49] Interstate Gas Supply, Inc., Southstar Energy Services, LLC's and Vectren Source's Response to Post Hearing Data Requests of Commission Staff.

[50] Rebuttal Testimony of Ellen Williams; Hearing Testimony of Ellen Williams.

[51] Interstate Gas Supply, Inc., Southstar Energy Services, LLC's and Vectren Source's Response to Post Hearing Data Requests of Commission Staff.