STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF SOUTHERN INDIANA GAS AND ELECTRIC COMPANY D/B/A CENTERPOINT ENERGY INDIANA SOUTH PURSUANT TO INDIANA CODE CH. 8-1-40.5 FOR (1) AUTHORITY TO (A) ISSUE SECURITIZATION BONDS; (B) COLLECT SECURITIZATION CHARGES; AND (C) ENCUMBER SECURITIZATION PROPERTY WITH A LIEN AND SECURITY INTEREST; (2) A DETERMINATION OF TOTAL QUALIFIED COSTS AND AUTHORIZATION OF RELATED ACCOUNTING TREATMENT; (3) AUTHORIZATION OF ACCOUNTING TREATMENT RELATED TO ISSUANCE OF SECURITIZATION BONDS AND IMPLEMENTATION OF SECURITIZATION CHARGES; (4) APPROVAL OF PROPOSED TERMS AND STRUCTURE FOR THE SECURITIZATION FINANCING; (5) APPROVAL OF PROPOSED TARIFFS TO (A) IMPLEMENT THE SECURITIZATION CHARGES AUTHORIZED BY THE FINANCING ORDER IN THIS PROCEEDING, (B) REFLECT A CREDIT FOR ACCUMULATED DEFERRED INCOME TAXES, AND (C) REFLECT A REDUCTION IN PETITIONER'S BASE RATES AND CHARGES TO REMOVE ANY QUALIFIED COSTS FROM BASE RATES; AND (6) ESTABLISHMENT OF A TRUE-UP MECHANISM PURSUANT TO INDIANA CODE § 8-1-40.5-12(c).	**)**	**CAUSE NO. 45722**

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR

PUBLIC'S EXHIBIT NO. 6

TESTIMONY OF WITNESS BRIAN MAHER

AUGUST 3, 2022

Respectfully submitted,

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TESTIMONY OF OUCC WITNESS BRIAN A. MAHER
CAUSE NO. 45722
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY D/B/A CENTERPOINT ENERGY INDIANA SOUTH

I. INTRODUCTION

Q: Please state your name and address.

A: My name is Brian A. Maher. I live at 8787 Bay Colony Drive, Naples, Florida.

Q: what is your position with Saber Partners, LLC?

A: I am currently a Senior Advisor to Saber Partners, LLC ("Saber Partners" or "Saber").

Q: Would you briefly provide an overview of your education and professional experience?

A: I graduated from Dartmouth College in 1970 Magna Cum Laude with a degree in Romance Languages. In 1973, I received a Master's degree in International Relations with a concentration in International Business and Finance from The Fletcher School of Law and Diplomacy. That year I joined Exxon Corporation (now ExxonMobil Corporation) where I worked for over 33 years, principally in the financial area, until my retirement from the company in 2006. Through multiple assignments in the United States and overseas, I progressed to the senior management level, holding positions of Treasurer for all international operations and Assistant Treasurer of the corporation. For over ten years, part of my responsibilities included supervision of all of ExxonMobil's capital markets activities. During that period, I managed billions of dollars of financings and presented annual corporate financing plans and periodic financing performance assessments to the ExxonMobil Management Committee, and at various times to

the Board Finance Committee. In addition, during my career I served as president of the corporation's worldwide insurance operations and oversaw worldwide pension and benefits funds, including serving on the New York Stock Exchange Corporate Pension Advisory Committee.

Q: Please state your relationship with Saber Partners?

A: Since 2006, I have been a senior advisor to Saber Partners where I have participated in several of Saber's financial advisory transactions relating to Ratepayer-Backed Bonds.

Q: Have you testified in a securitization or Ratepayer-backed Bond financing order proceeding before?

A: Yes. In 2015 I provided direct testimony to the Florida Public Service Commission ("FPSC") on Duke Energy Florida's ("DEF") $1.3 billion Ratepayer-Backed Bond transaction, which refinanced the unrecovered cost of a retired nuclear power plant. In 2020 I provided direct testimony to the North Carolina Utilities Commission concerning the Joint Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Issuance of Securitization Financing Orders. I testified on several issues, including the role of a fiduciary and need for ratepayer involvement in the bond's structuring, marketing, and pricing after the issuance of a Financing Order. I also testified regarding the benefits of a "Bond Team," which included an outside technical expert and financial advisor to the ratepayer representatives.

Q: What is the purpose of your testimony?

A: My focus will be the appropriate relationship between (i) the Indiana Office of Utility Consumer Counselor ("OUCC") with its independent experts and advisors and (ii) the other key parties in the transaction, essentially Southern Indiana Gas

and Electric Company d/b/a CenterPoint Energy Indiana South ("CEI South"), CEI South's advisors, and the investment banks that will likely underwrite the Ratepayer-Backed Bonds at issue in this proceeding. Counsel has advised me that by Indiana law the only statutorily-authorized entity that appears on behalf of ratepayers before the Indiana Utility Regulatory Commission ("Commission") is the OUCC.

I will explain what a fiduciary relationship in a financial transaction means and how it applies to this proceeding. From my experience as a AAA/Aaa bond issuer that interacted with underwriters and investors on the sale of securities, I will explain some of the dynamics of the market and why just achieving a AAA/Aaa rating does not guarantee the lowest cost of funds at any given time when negotiating with underwriters. I will also discuss the need for certifications from the various parties so that the Commission has the essential evidence to consider when it makes the final decision on the issuance advice letter as proposed by CEI South.

II. COMMISSIONERS NEED TO UNDERSTAND THE RELATIONSHIP BETWEEN UNDERWRITERS AND ISSUERS

Q: From your experience, what relationship do you expect between bond issuers and the banks that serve as underwriters in corporate bond issuance transactions?

A: As an employee and officer of ExxonMobil, I always expected to develop a cooperative and collegial relationship with the banks that underwrote the bonds to achieve the lowest overall costs possible for the financings. This required a lot of work on both sides. In traditional corporate bond transactions, issuers of bonds and the banks that underwrite the bonds share some, but not all, of the same key

objectives for the transaction. On the positive side, the banks very much want to be perceived as capable of executing an efficient, competitive transaction to earn repeat business as well as new business from other issuers that monitor the market. But issuers and banks are often on opposite sides of the table when it comes to (i) profits to be earned by the banks, (ii) the amount of effort and time the banks need to spend to achieve the best possible transaction, and (iii) the desire of the banks' investor clients to earn attractive returns. For these reasons, issuers should always play an active role in the transaction to make sure their own interests are maximized.

Q: What relationship do you expect between issuers of traditional corporate bonds and banks that serve as financial advisors to those bond issuers?

A: I would expect their interests to be perfectly aligned. While at ExxonMobil, we employed an experienced staff of professionals with deep experience in issuing traditional corporate bonds. But when a financial transaction involved unusual features, ExxonMobil would sometimes hire an investment bank or others to serve as financial advisor for that transaction. In those transactions, I expected the interests of ExxonMobil's financial advisor to be perfectly aligned with the interests of ExxonMobil. This because ExxonMobil hired the advisors to serve ExxonMobil's interests, not the interests of the advisors or other parties.

III. FIDUCIARY RELATIONSHIP

Q: Is a fiduciary relationship a particular concept on which the Commission should focus when assessing the relationship with banks that act as either underwriters or financial advisors?

A: Yes. It is often, but not exclusively, referred to as a "fiduciary relationship" or the "best interests" of the client relationship and not underwriters' or advisor's direct

financial interest. A fiduciary has an obligation, an important obligation, to work in the best interests of its client and not in its own financial or economic interest.

Perhaps the Commissioners have seen those commercials where Fisher Investments tries to distinguish themselves from other broker-dealers who sell stocks and bonds to earn commissions. They say Fisher Investments are fiduciaries and have an obligation to work in the best interest of their clients.

There are very important differences in the working relationships between and among underwriters, advisors and the process that occurs that affect ratepayers' pocketbooks in any Ratepayer-Backed Bond offering. For example, the relationship between CEI South and Barclays, if they are the structuring advisor, might be separate from the relationship between CEI South and Barclays under a separate, future underwriting agreement.

In fact, fiduciary duty and whether it is an important issue has been a focus of much discussion, debate and litigation. In a well-known example, a lawsuit was filed against Goldman Sachs & Co., who was an underwriter on an initial public offering ("IPO") for a company called EBC I, Inc., formerly known as eToys Inc. ("eToys"), that went bankrupt within two years after an initial public offering where it raised capital to invest in its business. The eToys' creditors alleged that Goldman and other underwriters had manipulated the initial stock price for gains on the first day of trading. I think we have all seen reported prices of an initial public offering shoot up immediately after the underwriters initially bought the shares from the company at a fixed price. While that may seem good for the investors, it often means the selling shareholders (owners) of the company left money on the table

and did not receive all the capital they were worth. Their shares were more valuable. It appears that they sold them to underwriters at a price below what investors would have paid. That leaves the company with less capital to run the business than if they sold at the higher after market price.

After a 2005 appellate court decision in the eToys litigation about whether Goldman Sachs might have a fiduciary duty went against Goldman Sachs, it became universal practice for underwriting agreements to expressly disclaim any fiduciary relationship with the issuer of securities. See Hunton & Williams, "Client Update – When Does an Underwriter Owe a Fiduciary Duty to an Issuer," dated August 2005, attached to my testimony as Exhibit BM-3. This practice is continued here, where CEI South states that Barclays has explicitly disclaimed any fiduciary duty when it serves as a structuring advisor or if an underwriter of Ratepayer-Backed Bonds.

Q: As structuring advisors to CEI south, does Barclays have a fiduciary relationship?

A: We believe that they should but apparently do not. We have not been allowed to review their engagement letter. However, CEI South responded that Barclays "is not a fiduciary" when asked if the structuring advisory firm has a fiduciary duty to act in the best interests of CEI South ratepayers, or the issuer of the securitization bonds, adding that they are an independent contractor.[1]

Q: What are the important issues for the Commission to know about fiduciary relationships?

A: In broad terms, when a service provider has a fiduciary obligation to its client, it

[1] See Exhibit BM- 5, CEI South's Response to OUCC DR 9-2(q).

commits to act in the client's best interests to the exclusion of any contrary interests. Where a fiduciary relationship exists, the client should be comfortable that the service provider is looking out for the client's best interests.

However, as I will describe, that alone does not ensure the best result for a given financial transaction. Even where there is a fiduciary relationship, sophisticated clients should work actively with their service providers to ensure alignment is complete in all important aspects of the transaction. Most significantly, where a fiduciary relationship does not exist, it is extremely important for the client to stay actively involved because the service provider could be subject to motivations in some way contrary to the best interests of the client.

The Securities Industry Markets Association, which is the broker-dealer's chief lobbying firm, defined on their website "fiduciary relationship" and "fiduciary duty" in this way as further described in Exhibit BM-4:

> A fiduciary relationship is generally viewed as the highest standard of customer care available under law. Fiduciary duty includes both a duty of care and a duty of loyalty. Collectively, and generally speaking, these duties require a fiduciary to act in the best interest of the customer, and to provide full and fair disclosure of material facts and conflicts of interest.

Q: Are you giving an opinion as to whether there is a legal requirement of any party in this transaction to have a fiduciary relationship?

A: No. I am discussing the important practical issues related to whether a fiduciary relationship exists in certain relationships and what the Commission should consider in deciding how to evaluate information it receives from different parties to the proposed transaction.

Q: Do underwriters have a fiduciary relationship with a Ratepayer-Backed bond issuer of securities?

A: No. In my experience, underwriters require an issuer to acknowledge that the underwriters have no fiduciary relationship to issuers. After the eToys case, underwriting agreements now include a specific declaration and acknowledgement by the issuer that the underwriters have no fiduciary relationship with the issuer. Issuers frequently are asked to acknowledge this affirmatively in the underwriting agreement. For example, the Underwriting Agreement filed with the SEC for the 2021 Southern California Edison, Ratepayer-Backed Bond transaction in which Barclays was a joint bookrunning underwriter transaction states:

> Absence of Fiduciary Relationship. Each of the Issuer and SCE acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and SCE with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or SCE. Additionally, none of the Underwriters is advising the Issuer or SCE as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and SCE shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or SCE with respect thereto. Any review by the Underwriters of the Issuer or SCE, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or SCE.[2]

[2] SCE Recovery Funding LLC Series 2021- A Senior Secured Bonds Underwriting Agreement, https://www.sec.gov/Archives/edgar/data/92103/000119312521048823/d102106dex11.htm

IV. IMPORTANCE OF PROTECTING THE RATEPAYER IF A FIDUCIARY RELATIONSHIP DOES NOT EXIST WITH CERTAIN KEY PARTIES TO THE TRANSACTION

Q: Does a lack of fiduciary relationships affect how bond issuers need to behave?

A: Bond underwriters will typically propose an offering process, including bond pricing, whereby the underwriters use their "professional judgment" in establishing price guidance" This is what the Companies' witness Mr. Chang has testified.[3] However, as clearly stated in the above excerpt from an underwriting agreement involving Barclays, the underwriters act for their own benefit and cannot always be counted on to act solely on behalf of the Issuer. Pricing is arguably the most important component of offering securities in the market. I believe this is a compelling reason why bond issuers need to be very active in the offering process: to protect their own interests.

Q: Is there language in underwriting agreements specifically referencing the absence of a fiduciary relationship?

A: Yes. As noted above and acknowledged by CEI South in its response to OUCC DR 9-3, attached to my testimony as Exhibit BM-1.

Q: Is this, or similar language contained in the underwriting agreement between the companies and the underwriters to be entered in this transaction?

A: Since underwriters have not yet been selected, there is no underwriting agreement at this time. However, the response by CEI South appears to imply that similar language is expected to be included.

Q: Does saber partners have a similar indemnification agreement with the OUCC?

A: No, it does not.

[3] Petitioner's Exhibit No. 3, Direct testimony of Eric K. Chang, p. 33, lines 17 and 29.

Q: Does Saber Partners have a fiduciary duty to Indiana ratepayers?

A: Yes. As financial advisor to the OUCC, Saber Partners considers itself as having a fiduciary duty to the OUCC and Indiana ratepayers.

Q: Who would issue the Ratepayer-Backed Bonds proposed by CEI South?

A: CEI South proposes to form a wholly owned, special purpose entity ("SPE") to issue bonds. That entity and CEI South would negotiate all agreements, terms and prices that affect ratepayers. They propose only to consult with the Commission from time to time and have the Commission make a final decision through a narrowly defined "Issuance advice letter" after all negotiations and decisions have been made and costs have been incurred.

Q: Will either CEI South or the SPE to be created to issue the bonds have the same financial incentives to achieve the lowest overall cost of funds as do more traditional issuers of corporate debt securities?

A: No. The Ratepayer-Backed Bond transaction is different from traditional corporate debt issues. In traditional corporate bond sales, the issuer has a direct interest in minimizing the cost of the transaction to maximize economics for its shareholders. As OUCC witness Joseph S. Fichera has shown, for traditional utility debt issues, there are similar incentives that exist for the issuer to minimize the costs of the transaction with the Commission retaining full review of the utility's cost of capital and ratepayer rates.

Here, CEI South does not have the direct incentive to minimize costs in this transaction. The ratepayers alone will bear all costs of the transaction. CEI South's main financial motivation would be to receive the debt proceeds in a timely, efficient manner. Whether the financing costs are low or high, or the interest rate is high or low, CEI South's authorized return to shareholders will not be affected.

Therefore, the traditional corporate bond model and utility bond model as described by Mr. Fichera does not apply to CEI South. In this unique Ratepayer-Backed Bond Offering they do not share the same incentives to achieve the lowest overall cost of funds as they do with their traditional utility bonds and as all corporate issuers have.

This really is just a matter of common sense and human nature. If I were going to borrow money and someone else agreed to repay it for me, then I would not be as concerned about the interest rate and other terms of the loan as I would be if I were on the hook to repay the loan myself.

Therefore, it is left to the Commission to establish in the financing order a process to ensure that the ratepayers achieve the lowest overall cost of funds for the bonds and the lowest securitization charges consistent with market conditions at the time the bonds are priced. In Indiana, this means the OUCC needs to be in the process and provide the necessary ratepayer representation during the process.

Under CEI South's current proposal, ratepayer interests would not be represented at the negotiating table. Yet, in other states as described by OUCC witnesses Rebecca Klein, Mr. Fichera and Paul Sutherland, the process included an independent financial advisor who participated in the bond issuance process and had the responsibility to help achieve the lowest securitization charges and avoid overpaying Wall Street and investors. This process as described in the testimony of OUCC witnesses Ms. Klein, Mr. Fichera and Mr. Sutherland gives the Commission evidence that the lowest cost to ratepayers has been achieved when it makes the final decision as to whether the bond offering should proceed or not. This is what I propose should happen here.

V. WAYS TO PROTECT RATEPAYERS INTEREST BY MODIFYING CEI SOUTH'S PROPOSAL

Q: Can you expand on your opinion that ratepayer interests would not be optimal or maximized under CEI South's proposal?

A: I believe that CEI South's proposal relies too heavily solely on CEI South, their advisors and the underwriters, none of which has a fiduciary responsibility to ratepayers in the proposed Ratepayer-Backed Bond transaction. As I said above, I do not doubt that CEI South has a desire to achieve low securitization charges for the ratepayer. But CEI South does not share the same financial incentives to achieve the lowest securitization charges. By participating in cooperative and collaborative processes similar to what I have observed and participated in other states, the system can work efficiently and effectively. CEI South can get its approved costs fully recovered, the ratepayers can get the lowest available securitization charges, and the Commission can be certain in giving up all future regulatory review of a customer rate – something that I have been told it has never done before – that the ratepayers got the lowest rates possible at the time of the Ratepayer-Backed Bond offering. This is what would be called a "win-win" but it does not happen automatically. It takes hard work.

Q: In a broad sense, how can the Commission ensure the OUCC and their independent financial advisor(s) successfully achieve the objective of ensuring that ratepayer interests are effectively maximized with respect to this transaction?

A: OUCC witness Hyman Schoenblum, Mr. Sutherland and Mr. Fichera's testimonies detail the best practice approach. Fundamentally, the Commission can ensure minimizing the costs imposed on ratepayers and maximum present value savings for ratepayers by establishing a post financing order/pre-bond issuance process that

will be based on the best practices established by CEI South's affiliates in Texas and by the Florida Public Service Commission and others.

This process would clearly set a decision standard that the parties should achieve the lowest securitization charge possible, based on market conditions at the time of the bond issuance. To achieve this standard, CEI South and CEI South's advisor(s) would work in a collaborative and cooperative way with the OUCC and their independent financial advisor(s) to achieve that objective and provide the evidence the Commission needs to consider in evaluating CEI South's proposed issuance advice letter and whether to approve or disapprove the issuance.

This process will require both parties to optimize structuring of the Ratepayer-Backed Bond issue, which includes:

1. Ensuring that disclosure documents and marketing materials accurately reflect the superior credit and minimal risks of Ratepayer-Backed Bonds;
2. Selecting the bank(s) to be used as underwriters and defining the role the banks will play and fees the banks will earn;
3. Actively monitoring the market to choose the most advantageous timing of the transaction;
4. Developing independent pricing expectations as detailed by Mr. Sutherland;
5. Participating in execution of the transaction to ensure that the size of the investor population is maximized, and that the investor population is

thoroughly educated about the extremely high credit quality of the storm recovery bonds; and

6. at the time of pricing of the bonds, ensuring that the OUCC and their financial advisor(s) monitor and provide input to the pricing process so that the lowest securitization charge is achieved.

As part of the process, CEI South, the bookrunning underwriter(s), and the OUCC, through its advisor, will commit, in writing, that the bond issuance achieved the lowest securitization bond charge for the ratepayers after pricing.

Certifications in securitized proceedings are one of the "best practices" in securitization transactions approved in other states. Mr. Sutherland's testimony provides a more granular description of the "Best Practices" that I believe should be employed to achieve a lowest securitization charge financing. His testimony, along with that of Mr. Schoenblum, documents the savings that have been achieved in previous Ratepayer-Backed Bond transactions when an active and independent financial advisor has been involved and when that active and independent financial advisor has employed the above approach.

VI. ACHIEVING THE LOWEST COST TO RATEPAYERS

Q: How is it really possible to know in absolute terms that the lowest securitization bond charge transaction has been achieved?

A: When issuers or regulators ask the parties for such a certificate or certification as referenced above, they are really asking these parties to confirm in writing that these parties believe all actions that could have been taken in the issuance process minimized the overall cost of the financing have in fact been taken. In practice, that confirming certificate should be supported by corroborating data, such as how the

actual pricing compared to the expectations developed by the underwriters, as well as expectations developed independently by the issuer(s) and independent technical expertise, how actual pricing compared to secondary market pricing of other similar securities at the time of pricing, and how successful the iterative price talk process was in lowering the interest rate to the optimal point of balancing investor demand with the supply of storm recovery bonds being offered.

Q: Should the lowest securitization charge standard apply to all costs associated with the transaction?

A: Yes. However, in considering how the lowest securitization charge standard should be applied, there is a difference between buying services and agreeing to pay interest on bonds. Services should not be determined solely based on a dollar cost, but also the quality of the services, with the goal of obtaining the best overall value.

In contrast, when an issuer borrows money there is no reason to agree to pay more interest (in present value terms) than is absolutely necessary. When you get a mortgage for your home do you want a reasonable rate or the lowest rate possible for your credit score and credit history? It is only logical that the lowest cost should be the decision-making standard for pricing a borrowing. Without such a standard, a bond issuer might save a lot of time and effort by just accepting whatever interest rate the underwriters and investors want. Home mortgages would be easier too because homeowners would never shop around for the best rate available among multiple mortgage lenders.

Q: Is it sufficient for an independent financial advisor to certify the transaction based on information provided by the utility, its banker, and the underwriters?

A: No. An "independent" analysis with no power or ability to conduct its own

investigation, to participate in the process, or verify the information provided to it by the underwriters or the utility is effectively dependent on the parties with an interest in litigation and thus is no better than just getting the certification directly from those parties.

What the ratepayers need is the OUCC, or its agent, to act on their behalf. Among the other duties that an agent owes its principal is a duty to act with the "care, competence and diligence normally exercised by agents in similar circumstances."[4] Fiduciaries likewise have a duty to inform their principles of facts within their knowledge that the principal would wish to know or which are material to the agents' duties.[5] This is why, for example, corporate boards (who act as fiduciaries to their shareholders) receive no legal protection if they make "unintelligent or unadvised" decisions."[6]

A certification from a third party without any independent investigation or knowledge of the fact is an unintelligent one, in my opinion. But because those companies owe no duties to the ratepayers, they are not required to exercise the same level of care that a fiduciary would.

Q: In your experience in business, would you make decisions based on unverified information provided by a party with interests that were not aligned with your own?

A: No. I would want someone who represented me to perform the proper due diligence and make a completely independent assessment.

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[4] Restatement (3d) of Agency § 8.08.

[5] *Id.* at § 8.11.

[6] *In re Walt Disney Co. Derivative Litig.*, 907 A:2d 693, 748 (Del. Ch. 2005)

VII. ALL AAA-RATED SECURITIES DO NOT PRICE ALIKE

Q: If the Ratepayer-Backed Bonds are rated "AAA," does that not guarantee that the lowest overall costs and the lowest securitization charges will be achieved?

A: Unfortunately, not. This was true for us at ExxonMobil even though ExxonMobil was a well-known and coveted AAA-rated debt issuer.

It is also true that all AAA debt is not viewed alike by investors in the debt capital markets. For example, when I worked at ExxonMobil, AAA-rated ExxonMobil or Federal Agency credits would get better pricing/lower interest rates than most AAA-rated structured debt securities like credit card or mortgage-backed securities that were backed solely by a pool of intangible contract rights. AAA ratings do not guarantee the lowest cost available.

Q: Are the Ratepayer-Backed Bonds proposed to be issued in this case likely to perform strongly in the AAA market?

A: Yes. In my view, the proposed bonds are likely to achieve a very strong AAA performance because they will be backed by a state regulatory guarantee to irrevocably provide for the timely payment of principal and interest from the revenues of an essential service (i.e., electricity).

However, even though there is a long history of this type of utility securitization transactions, the features of these proposed Ratepayer-Backed Bonds are sufficiently complex that I believe an intensive investor education effort and an aggressive marketing process are warranted to ensure that the bonds achieve the tight pricing they deserve. The capital markets are large, as Mr. Fichera has described, so competing for investors' attention is challenging for a new issuer like CEI South's bonds will be. Mr. Fichera and Mr. Sutherland discuss more in detail

how these costs can vary especially given the recent explosion of new Ratepayer-Backed Bond issues that have varied widely.

Q: Are there any examples of ways an issuer could assist in capturing the full value of the securities to be offered here?

A: Yes. The SEC registration statements pursuant to which a number of prior Ratepayer-Backed Bonds have been offered have provided detail about the unusual and superior credit quality of the securities. The SEC materials are the primary way of informing investors of the benefits and risks of the securities in a fair and balanced manner.

For example, the final prospectuses included in SEC registration statements for investor-owned utility securitized bonds issued in 2007 and 2009 for the benefit of Monongahela Power Company and for The Potomac Edison Company include the following language:

> Credit Risk: PSC-Guaranteed True-Up Mechanism and State Pledge Will Limit Credit Risk. In the Financing Act, the State of West Virginia pledges to and agrees with the bondholders, any assignee and any financing parties that the state will not take or permit any action that impairs the value of environmental control property or, except as part of the true-up process, reduce, alter or impair environmental control charges that are imposed, collected and remitted for the benefit of the bondholders, any assignee, and any financing parties, until any principal, interest and redemption premium in respect of environmental control bonds, all financing costs and all amounts to be paid to an assignee or financing party under an ancillary agreement are paid or performed in full. The broad-based nature of the true-up mechanism and the State Pledge serve to effectively eliminate, for all practical purposes and circumstances, any credit risk to the payment of the bonds (i.e., that sufficient funds will be available and paid to discharge the principal and interest of each issue of bonds when due).[7]

This same language appeared in the $1,851,000,000 CenterPoint Energy Transition Bond Company II, LLC offering in 2005:

[7] https://www.sec.gov/Archives/edgar/data/1384732/000095012007000242/mp-prospectus.htm (at page 26); https://www.sec.gov/Archives/edgar/data/1384731/000095012007000244/pe-prospectus.htm (at page 26); https://www.sec.gov/Archives/edgar/data/1384732/000119312509255754/d424b1.htm (at page 27); https://www.sec.gov/Archives/edgar/data/1384731/000119312509255755/d424b1.htm (at page 28).

> The broad-based nature of the true-up mechanism and the state pledge described above, along with other elements of the Bonds, will serve to effectively eliminate, for all practical purposes and circumstances, any credit risk associated with the Bonds (i.e., that sufficient funds will be available and paid to discharge all principal and interest obligations when due). Please refer to the financing order, Finding of Fact 107, as well as "The Restructuring Act—CenterPoint Houston and Other Utilities May Securitize Qualified Costs," "CenterPoint Houston's Financing Order—Statutorily Guaranteed True- Ups," "Risk Factors" and "Cautionary Statement Regarding Forward-Looking Information" in the accompanying prospectus.[8]

The kind of language used in the above examples is stronger than that which has been used in some other securitizations. It can be helpful to achieve the financial benefits of the superior credit characteristics of the proposed Ratepayer-Backed Bonds.

Q: Was this disclosure language concerning the "credit risk" of Ratepayer-Backed Bonds developed through a collaborative and collegial process with the utility?

A: Yes. Saber's records have been shared with me concerning this disclosure language. I have reviewed those records and have found they indicate that this "credit risk" language was developed for an earlier Ratepayer-Backed Bond in Texas for Oncor/TXU where Saber served as the independent financial advisor to the Public Utility Commission of Texas in a similar capacity that we propose for the OUCC here. Saber's records show that this disclosure language was proposed by Hunton & Williams, legal counsel to the investor-owned utility in collaboration and discussion with the independent advisor to best inform investors of the unique

[8] See $1,851,000,000 CenterPoint Energy Transition Bond Company II, LLC page S-3 https://www.sec.gov/Archives/edgar/data/1310914/000095012905011940/h30993d5e424b5.htm

credit qualities of that utility securitization. (See Exhibit BM-2).

VIII. NEED FOR INDEPENDENT EXPERTISE SUPPORTING DESIGNATED OUCC INVOLVEMENT IN BOND TEAM

Q: Would the proposed bond team play the role you are advocating so that ratepayers are assured the lowest securitization charge?

A: Yes. However, it all depends on who is on the Bond Team and how the role of the Bond Team is defined and executed. I believe that the Bond Team should consist of CEI South, CEI South's advisor(s) (provided such advisor is not one of the banks acting as underwriter for the transaction), the OUCC, and the OUCC's independent advisors and counsel.

It is very important for the ratepayers and the ratepayer representative to be closely involved in the process for the outcome to be optimal based on basic financial principles where in a financial negotiation all parties act rigorously in their financial interests. Counsel has advised me that in Indiana, the OUCC is the statutory ratepayer representative.

At ExxonMobil, our CEO was well versed in every aspect of the business, and when briefed on complex financial matters, could rapidly come up to speed and make informed decisions. In this transaction there are many complexities, and this is not the type of work that the OUCC, Commission or CEI South undertakes on a regular basis. Consequently, outside independent expertise is needed. CEI South hired Barclays. The OUCC hired Saber Partners.

It is important that the Bond Team operate independently and entirely in the interest of the ratepayers and not include any of the underwriting banks due to their inherent conflict of interest discussed above. All outside advisors of the Bond Team

should have a fiduciary relationship to their clients. Remember, that means an obligation to act in the best interests of their clients and not their own financial interest.

Decisions of the Bond Team should be a shared responsibility of its members. The final decision as to whether to submit an issuance advice letter to the Commission would remain with CEI South. However, CEI South and OUCC would work through the process collaboratively to decide on what is in the ratepayers' best interests and present separate certifications to the Commission to consider when making the final decision.

The Bond Team should rigorously follow the market and provide strong input to the underwriters regarding bond structure, timing of the issue, the education of target investors and the pricing process.

Then CEI South, OUCC's independent financial advisor and the underwriters would deliver certifications to the Commission that the lowest cost to the ratepayers has been achieved under market conditions at the time of the offering. These certifications would be modeled on best practices and the certification CenterPoint, and an independent advisor have given in Texas as described in Ms. Klein and Mr. Fichera's testimonies.

After the Ratepayer-Backed Bonds are issued, the Bond Team should follow the trading of the bonds in the secondary market and thoroughly evaluate the execution of the transaction to be comfortable that the best results were in fact obtained for ratepayers, and to learn any lessons for future Ratepayer-Backed Bond issues.

Q: Is it clear at the current stage in the process how the Ratepayer-Backed Bond issue should be structured?

A: Not at this point. We know that the Ratepayer-Backed Bonds will be sold some time in 2023. However, many important details will be determined as the sale date approaches and the market continues to develop. For example, Mr. Sutherland proposes the length of the bonds be extended from 15 years to 19 years with a substantial increase in net present value savings for ratepayers while CEI South still gets the full amount approved as determined by the Commission. As CEI South's witness Brett A. Jerasa admits, terms of the bonds are still estimates and everything can change up to the moment the bonds are sold.[9] Mr. Fichera outlines other items that can change during what he describes as "Phase 2" of the Financing Order process.

Q: Do you have an opinion as to whether the Ratepayer-Backed Bond issue should be executed on a competitive or negotiated basis?

A: Yes, although I think a final decision should be made closer to the time that the bonds could be offered for sale to investors. Regarding the role the underwriters will play, this transaction probably is not ideal for a rigid competitive approach where the issue date is set in advance and the qualifying banks bid on pricing close to that date.

This is because, in addition to wanting to remain flexible on timing of the issue, a longer marketing period is warranted to effectively sell the credit to investors. A negotiated approach appears preferable, where a highly competitive process is used to select one or more highly qualified banks to lead the transaction.

[9] Jerasa Direct, p. 28, lines 1-7.

In a negotiated sale, there are a variety of techniques that can be used to induce the selected underwriters to compete on final pricing. In the end, if the marketing of the bonds is effective, there should be a lot of strong orders from a broad cross section of institutional and retail investors, both from the U.S. domestic and international markets, seeking safety and security to purchase Ratepayer-Backed Bonds from the selected underwriters. Then it is crucial that the market price talk (the indications made to investors about what the possible interest rate will be before actual pricing) be conducted in a manner so that demand and supply are matched at the lowest interest rate possible. As I have said previously, these are areas where a well-informed, aggressive Bond Team can add significant value.

The above is especially critical if CEI South continues to promote a "best efforts" rather than "firm commitment" underwriting approach with the selected underwriters. In my view, best efforts can be interpreted as effectively the opposite of a competitive bidding approach with a firm commitment. Depending on how best efforts is structured, the underwriters may have virtually no commitment to execute the financing. Their incentive could largely be to find enough investors to ensure the financing gets done so they can collect their fees. This approach can be the subject of much debate but arguably may not promote achieving the lowest possible cost for the ratepayer. Once again, I conclude that CEI South and OUCC would need to be very active in the book building and pricing process.

Q: Please summarize your testimony.

A: The proposed Ratepayer-Backed Bonds should achieve a "AAA" rating and perform well in the market. **But superior performance is not automatic since all**

"AAA" bonds do not price alike. Therefore, ratepayer costs can vary significantly from the time need to be fully involved in with the financing order is issued to the time the bonds are priced.

The key takeaway should be that, while factors such as underwriters' professional opinions are valuable, underwriters do not have any fiduciary responsibility to the ratepayer – no obligation to optimize the transaction and make it the "win-win" that CEI South and the OUCC say they want.

Similarly, CEI South's primary responsibility is to their shareholders and is isolated from bearing any of the financial costs of the transaction and will seek to raise the funds as quickly as possible.

Therefore, as the Securitization Statute clearly permits, the Commission should establish a process that includes the OUCC and their independent financial advisor(s) to provide the information for the Commission to make the final decision. Counsel has advised me that under Indiana law these entities are obligated to look out for the ratepayers' best interests like the fiduciary I have discussed.

Equally important, the Commission can only make decisions based on evidence. So, it is critical that the Commission adopt the best practices and lessons learned from other states like Texas and Florida as the testimonies of Witness Leja D. Courter and Ms. Klein explain. This means the OUCC, and its advisors, play an active role in all aspects of the transaction. Together, CEI South and the OUCC must be willing to invest all the time necessary in the structuring and take an aggressive stance during the marketing process to capture the lowest present value

cost of financing and the lowest securitization charges for the ratepayers. This should involve full participation in the transaction with the underwriters and, if required, timely decision making by the OUCC to resolve any potential financing issues in the ratepayers' best interests.

The final step is for CEI South, the OUCC's independent financial advisor and the underwriters to deliver certifications to the Commission that the lowest cost to the ratepayers has been achieved under market conditions at the time of the offering. These certifications must not be qualified in any material way. When the Commission has received these certifications and supporting materials, it will then have the evidence upon which to make the final decision as proposed by CEI South: i.e. whether to issue a stop order or not.

Q: Does this conclude your testimony?

A: Yes.

9-3. In the December 9, 2005 underwriting agreement between CenterPoint Energy Houston and the underwriters for CenterPoint Energy Transition Bond Company II for Texas Public Utility Commission Docket No. 30485, the following section was included to the Underwriting Agreement[2]:

a) "Absence of Fiduciary Relationship. Each of the Issuer and the Company acknowledges and agrees that: (a) the Underwriters have been retained solely to act as underwriters in connection with the sale of the Bonds and that no fiduciary, advisory or agency relationship between the Underwriters, on one hand, and the Company and/or the Issuer, on the other hand, has been created in respect of any of the transactions contemplated by this Underwriting Agreement, irrespective of whether the Underwriters have advised or are advising the Company and/or the Issuer on other matters; (b) the price of the Bonds was established by the Issuer and the Company following discussions and arms-length negotiations with the Underwriters, among others; (c) it has been advised that the Underwriters and their affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Issuer and Company and that the Underwriters have no obligation to disclose such interests and transactions to the Issuer or the Company by virtue of any fiduciary, advisory or agency relationship; and (d) it waives, to the fullest extent permitted by law, any claims it may have against the Underwriters for breach of fiduciary duty or alleged breach of fiduciary duty and agrees that the Underwriters shall have no liability (whether direct or indirect) to the Issuer or the Company in respect of such fiduciary duty claim or to any person asserting a fiduciary duty claim on behalf of or in right of the Issuer or the Company including stockholders, employees or creditors of the Issuer and/or the Company."
b) However, in the underwriting agreements for CenterPoint Energy Transition Bond Company I, there is no such section or statement.3 Why was this "Absence of Fiduciary Relationship" section added to the CenterPoint securitization bond underwriting agreement in 2005 and all subsequent securitization bond underwritings? Please explain.
c) What is the significance of this term of the underwriting agreement?
d) In this "Absence of Fiduciary Relationship" section, it states that "the price of the Bonds was established by the Issuer and the Company following discussions and arms-length negotiations with the Underwriters, among others;" What is meant by "arms-length negotiations?" Please explain.
e) When underwriters use their professional judgement to increase the spread, are they providing advice or a recommendation to the issuer that is in the issuer's/ ratepayer's best interest and not in the underwriter's economic interest?
f) Please describe how CEI South would determine the appropriate credit spreads for each tranche in an "arms-length" negotiations with the underwriters to ensure the lowest cost to ratepayers/ optimal transaction for CEI South's ratepayers.
g) Please refer to p. 33, lines 13-16, of Mr. Chang's direct testimony, which states, "This step can only occur when the book has at least an equal amount of orders on the bonds as the principal amount of securitization bonds offered (generally referred to as being "fully-subscribed")." Is this consistent with the financial industry definition (FINRA/SEC) of a firm commitment underwriting or is it a best efforts underwriting or something else?
h) Has Barclays ever underwritten bonds? i.e., have they ever entered into a firm commitment underwriting agreement without the bonds of all tranches fully subscribed by any amount?

[2] Referenced at: https://www.sec.gov/Archives/edgar/data/48732/000095012905012020/h31290aexv1w1.txt
[3] Referenced at: https://www.sec.gov/Archives/edgar/data/1098911/000102140801508585/dex11.txt

i) Does Mr. Chang have any experience or know of any firm that has underwritten bonds? i.e., entered into a firm commitment underwriting agreement without the bonds of all tranches fully subscribed by any amount?
j) Does Barclays have a policy against underwriting bonds of a series or tranche? i.e., enter into a firm commitment underwriting agreement without the bonds of all tranches fully subscribed by any amount? If so, please describe.
k) Is CEI South or Barclays aware of any firm acting as an underwriter who will not enter into a firm commitment underwriting without the bonds fully subscribed by any amount? If so, please identify.
l) Please provide a detailed explanation and supporting documentation as to how CEI South plans to ensure that the underwriters are working in the best interests of the ratepayers in a negotiated or firm commitment underwriting given the agreement above that there is an "Absence of a Fiduciary Relationship" between the underwriters CEI South or its ratepayers.

Objection:

Petitioner objects to the Request on the grounds and to the extent it seeks information that is irrelevant to and beyond the scope of this proceeding, and not reasonably calculated to lead to the discovery of relevant or admissible evidence. Petitioner further objects to OUCC DR 09.3(d) to the extent it seeks a legal conclusion as to the definition of "arms-length negotiation." Petitioner further objects to OUCC DR 09.3(f) on the separate and independent grounds and to the extent it misstates the applicable statutory requirements or attempts to impose a requirement not present in the statute through the phrase "ensure the lowest cost to ratepayers/ optimal transaction for CEI South's ratepayers." Petitioner further objects to OUCC DR 09.3(h), (i) and (j) to the extent it is irrelevant and beyond the scope of this proceeding given that Barclays has not been engaged as the underwriter for CEI South's securitization bond offering. Petitioner further objects to OUCC DR 09.3(k) on the grounds and to the extent it is irrelevant and beyond the scope of this proceeding. CEI South has not selected the underwriter for securitization bond offering, and the practices of underwriting firms in general are not relevant to this proceeding.

Response:

Subject to and without waiver of the foregoing objections, Petitioner responds as follows:

a) No questions are asked in 9-3a.

b) The "Absence of Fiduciary Relationship" provision became a standard provision in all investment bank engagement letters, underwriting agreements, bond purchase agreements and similar agreements as a result of the eToys Inc. litigation. In the eToys case, the New York State Court of Appeals held that an issuer in an IPO can properly assert a claim for breach of fiduciary duty against an underwriter based on the issuer's reliance on the underwriter's expertise and advice on the pricing of an offering (EBC 1 Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 (N.Y. 2005)).

c) This provision, like others in a standard underwriting agreement, expressly sets forth the contractual relationship between an issuer and the underwriters in connection with a firm commitment underwritten offering of securities.

d) As noted in this provision, the price to the public for the securities and the purchase price for the securities that the underwriters pay the issuer are set after discussions and negotiations between the issuer and the underwriters.

e) The spread on utility securitizations may increase, decrease, or stay the same depending on market conditions at the time of issuance and overall investor demand for the bonds. Any decisions that CEI South makes on spreads will be consistent with CEI South's commitment to optimize benefits.

f) CEI South will work with the Commission and the underwriting syndicate to evaluate the pricing of the bonds to ensure that it meets the requirements of the statute.

g) This is consistent with a best efforts underwriting approach.

h) See objection.

i) See objection.

j) See objection.

k) See objection.

l) CEI South will comply with all requirements of the Financing Order and Securitization Act in regard to customer savings and is committed to structuring and marketing the bonds to optimize benefits.

Churaman, Mahendra, 12:32 PM 3/30/2004, RE:

X-Original-To: jfichera@saberpartners.com Delivered-To: jfichera@saberpartners.com Subject: RE:

Date: Tue, 30 Mar 2004 11:32:31 -0500 X-MS-Has-Attach:
X-MS-TNEF-Correlator:
Thread-Topic: RE:
Maher Exhibit 2 Page 1 of 2 DOCKET NO. E-2, Sub 1262 DOCKET NO. E-7, Sub 1243

Thread-Index: AcQV2bmgmi5Alm9dQ0Cp+i5yE/oUiAAmq+IQ
From: "Churaman, Mahendra" <mchuraman@thelenreid.com>
To: "Joseph Fichera" <jfichera@saberpartners.com>
X-OriginalArrivalTime: 30 Mar 2004 16:32:31.0699 (UTC) FILETIME=[9949E230:01C41674]

Does the following work for you?

"The broad-based nature of the true-up mechanism and the State Pledge serve to effectively eliminate, for all practical purposes and circumstances, any credit risk associated with the transition bonds."

-----Original Message-----
From: Joseph Fichera [mailto:jfichera@saberpartners.com]
Sent: Monday, March 29, 2004 5:04 PM
To: Churaman, Mahendra Subject:
Re:

Hmmmm. I think I like it but for the "reasonably forseeable".

Let me think and tinker but it is a lot better than I expected. Progress.
Praise the Lord.

-----Original Message-----
From: "Churaman, Mahendra" <mchuraman@thelenreid.com>
Date: Mon, 29 Mar 2004 16:52:22
To:<jfichera@saberpartners.com
> Subject: FW:

What do you think of Neil's proposed language?

-----Original Message-----
From: Miller, Shannon [mailto:smiller@hunton.com] On Behalf Of Anderson, Neil
Sent: Monday, March 29, 2004 3:47 PM
To: Churaman, Mahendra; Ronnie Puckett (E-mail) Subject:

Ronnie and Mahendra - What do you think of this? Mahendra, if it is okay with you, Steve and Ronnie, you can forward it on.

The broad-based nature of the true-up mechanism and the

State Pledge serve to effectively eliminate, for all practical purposes and in all reasonably foreseeable circumstances, credit risks associated with the transition bonds.

Shannon Miller
Professional Assistant to Neil Anderson
Hunton & Williams LLP
214.979.8247

Maher Exhibit 3
DOCKET NO. E-2, Sub 1262
DOCKET NO. E-7, Sub 1243

HUNTON& WILLIAMS

CLIENT UPDATE

August 2005

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Does an Underwriter Owe a Fiduciary Duty to an Issuer?

A recent decision[3] by New York's highest court serves as a warning to underwriters and their counsel of the continuing fallout from the "dot-com" bust of the late 1990s. The decision states that the lead managing underwriter in a firm commitment underwriting may owe a fiduciary duty to the issuer to disclose conflicts of interest in connection with the pricing of securities. The court based its decision not to dismiss the breach of fiduciary duty complaint on the allegation that the underwriter assumed an additional "advisory relationship that was independent of the New York underwriting agreement."

The plaintiff was the unsecured creditors committee of the now defunct eToys, Inc., an internet-retailer specializing in children's products, that conducted an initial public offering in May 1999. eToys filed for bankruptcy in March 2001. The defendant, Goldman, Sachs & Co., was the lead managing underwriter. Shares in eToys traded up from the offering price of $20 to a first day closing price of $77. In its breach of fiduciary duty claim, the plaintiff alleged that "eToys relied on Goldman Sachs for its expertise as to pricing, and that Goldman Sachs gave advice to eToys without disclosing that it had a conflict of interest." Specifically, the complaint alleged that Goldman Sachs intentionally underpriced the IPO and then allocated shares from the offering to customers who allegedly "were obligated to kick back to Goldman a portion of any profits that they made" from reselling the shares.

The court found that, even while an underwriting agreement did not in and of itself create a fiduciary duty, a breach of fiduciary duty claim may survive for pleading purposes where the plaintiff alleges that the underwriter had an advisory relationship with the issuer. The court found that such a relationship may have existed because the complaint alleged an advisory relationship that was independent of the underwriting agreement. The court reasoned that an underwriter, as an advi-

[3] http://www.courts.state.ny.us/ctapps/decisions/jun05/61opn05.pdf

sor, is required to disclose to an issuer

"any material conflicts of interest that render the advice suspect." As the court stated, the "plaintiff alleges eToys was induced to and did repose confidence in Goldman Sachs' knowledge and expertise to advise it as to a fair IPO price and engage in honest dealings with eToys' best interest in mind." Based on this analysis, the court determined that the complaint adequately alleged that Goldman Sachs breached its fiduciary duty to eToys by failing to disclose an alleged conflict of interest stemming from "its profit-sharing arrangements with its clients."

The court's finding is troubling because the mere allegation by a plaintiff that the relationship involved something greater than just an underwriting relationship may now be enough to sustain a lawsuit. It is too early to understand the ramifications of this decision, but we believe the court, by finding such a fiduciary relationship, misread the role of lead underwriters in modern public offerings. In the ordinary course of raising capital for clients, lead underwriters almost always advise clients on the market conditions for the offering and the price of the offering. As the dissent stated, the consequences of this decision "wars with [the court's] precedent and potentially conflicts with a highly complex regulatory framework designed to safeguard investors."

As a result of this decision, we recommend that underwriters:

- update their form underwriting agreements to include provisions disclaiming any type of fiduciary relationship with the issuer and making the issuer aware that there is no such type of relationship; and
- adopt internal procedures to make the limited nature of the relationship expressly clear to the issuer.

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Fiduciary Standard Resource Center

Overview

A fiduciary relationship is generally viewed as the highest standard of customer care available under law.

Fiduciary duty includes both a duty of care and a duty of loyalty. Collectively, and generally speaking, these duties require a fiduciary to act in the best interest of the customer, and to provide full and fair disclosure of material facts and conflicts of interest.

Today, financial advisers and broker-dealers are regulated by different laws. The current system, established in the 1940s, leaves states free to develop their own often conflicting definitions of fiduciary standards. This can confuse investors and lead to inconsistent definitions and interpretations under existing state law.

As part of its comprehensive financial regulatory proposal in 2009, the Obama Administration proposed to standardize the care that investors receive from financial professionals, whether financial advisers or broker-dealers at the federal level.

Under the Dodd-Frank Act, Congress directed the Securities and Exchange Commission (SEC) to study the need for establishing a new, uniform, federal fiduciary standard of care for brokers and investment advisers providing personalized investment advice. The Act further authorized the SEC to establish such a standard if it saw fit.

Separate from and conflicting with the definition of fiduciary being contemplated under Dodd-Frank, the Department of Labor (DOL) has proposed a wholesale revision to its regulation that redefines what it means to be a fiduciary under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code.

See SIFMA's resource center on the DOL Fiduciary Standard ›

Position

Since early 2009, SIFMA has consistently advocated for the establishment of a new uniform fiduciary standard, and not application of the Advisers Act fiduciary standard to broker-dealers.

The new standard envisioned by SIFMA would: put retail customers' interests first; provide adequate flexibility to preserve and enhance customer choice of and access to financial products and services, and capital formation; provide for conflicts management; apply only to, and be tailored for, those services and activities that involve providing personalized investment advice about securities to retail customers; and not subject financial professionals to other fiduciary obligations (for example, the Advisers Act fiduciary standard, or other statutory standards).

SIFMA, through our member committees and otherwise, continues to engage policymakers and regulators with comprehensive empirical and legal analysis to help inform the process. We are hopeful that our substantive engagement and input will positively impact any rulemaking or other actions on this issue.

http://www.sifma.org/issues/private-client/fiduciary-standard/overview/

9-2. Please refer to the direct testimony of Eric K. Chang, p. 2, lines 14-18 of the direct testimony of Mr. Chang. While Mr. Chang describes Barclays as "a financial advisor and banking witness"; in the direct testimony of Brett A. Jerasa at p. page 12, line 2, references a "structuring advisor." On p. 19, lines 12-13, of his direct testimony, Mr. Jerasa also indicates, "The structuring fee is paid to Barclay's, CEI South's advisor, for providing financial advisory services." Please also refer to Petitioner's Exhibit No. 2, Attachment BAJ-4 – NBV Projections – Upfront Fee Comps and note there is no line item for "financial advisor and banking witness" or "structuring fee." How is Barclays being compensated? Please explain.

a. Will Barclays be paid from securitization bond proceeds? If so, is this compensation on a contingency basis and dependent on the issuance of the securitization bonds? Is Barclays' fees on a "flat" or on an hourly basis? If the fees are contingent, how can Barclays ensure that they will act in the best interest of CEI South or its ratepayers?

b. Is Barclays the "structuring advisor" for the securitization bond or CEI South's "financial advisor," or both?

c. Are Barclays' services related to the structuring advisor for the bonds different from the services as financial advisor for CEI South?

d. Please identify the specific services that Barclays is expected to perform as either the structuring advisor or financial advisory services.

e. If Barclays is both financial advisor and structuring advisor, what fees have been agreed to with Barclays for each of these services

    i. financial advisory,

    ii. banking witness, and

    iii. structuring advisor?

f. Please describe the duties and the deliverables of each of the services and corresponding role, and when would they be expected to begin and end?

g. How much has been spent or committed to as of the date for each of Barclays' services above in which CEI South responds to this request?

h. Is the primary service/deliverable of the structuring advisor to develop an excel-based financial model of the charge for the rating agencies to evaluate the transaction in relation to their rating criteria and stress testing to achieve a top credit rating e.g., AAA?

i. What fees, sums, or other amounts is Barclays or the structuring advisory firm charging solely to provide the financial model for use in this securitization bond transaction?

j. Did CEI South have a competitive process to select Barclays or any other firm as structuring advisor or financial advisor for the securitization bonds?

k. Did CEI South use a form of "request for proposal" or "request for qualifications"? If so, please provide 1) a copy of such document and 2) the responses of all recipients of the CEI South request.

l. How did CEI South decide which firms to invite to present proposals to serve as the structuring advisor or financial advisor?

m. Please provide a copy of the final engagement letter terms and conditions including, but not limited to, any disclaimers by Barclays as well as indemnifications provided to Barclays by CenterPoint Energy, CEI South or any of its affiliates.

i. In the Barclays engagement letter, does Barclays, "as financial advisor and banking witness," have a fiduciary duty to act in the best interests of CEI South, CEI South ratepayers, or the issuer of the Securitization Bonds and not in its own financial interest? Please explain.

ii. In the public power and state and local government market, financial advisors are not only required by their regulator, the MSRB, to hold a "duty of loyalty" (i.e., deal honestly and in the best interests of the issuer) but also a "duty of care" which requires them to possess specialized knowledge to make appropriate recommendations to the issuer. Does Barclays engagement letter reflect these same duties in their financial advisor or structuring advisor role?

iii. In the engagement letter of the structuring advisor, does the structuring advisory firm have a fiduciary duty to act in the best interests of CEI South ratepayers, or the issuer of the securitization bonds, and not in its financial or economic interest? Please explain.

iv. If Barclays or the structuring advisor has no fiduciary duty to CEI South or to CEI South's ratepayers, how will the Indiana Utility Regulatory Commission ("Commission") and others know what Barclays or the structuring advisor recommends is in the best interests of CEI South's ratepayers, and not CEI South's of Barclays' financial or economic interests?

n. Would CEI South agree to pursue a competitive selection of an independent financial modeling firm as structuring advisor to save ratepayers up-front costs? If not, why not?

o. Can Barclays, either as CEI South's financial advisor or structuring advisor, also be an underwriter of those bonds?

p. If Barclays is performing multiple roles in this financing, do any of these roles constitute a conflict of interest?

q. If Barclays may become one of the underwriters, how will that affect their respective fiduciary duties if any as financial advisor to CEI South and/or structuring advisor to CEI South's ratepayers? If Barclays has no fiduciary duties to either and may act in its financial and economic interest and not the interest of CEI South ratepayers, please state and confirm.

r. Please refer to page 6 line 16-20, of the direct testimony of Mr. Chang, which states "Utility securitizations are also a well-established asset class that are broadly understood in capital markets. A diverse range of investors have participated in utility securitizations to date, including domestic and international banks, money managers, investment advisors, pensions funds, insurance companies, corporate cash managers, and different types of trust funds."

i. Please provide the supporting evidence to the ownership of utility securitization bonds by investor type alleged by Mr. Chang i.e., by "domestic and international banks, money managers, investment advisors, pensions funds, insurance companies, corporate cash managers, and different types of trust funds" in size and amount.

ii. If there is no independently verifiable information to support the statement, please acknowledge or provide the source for such information.

s. Does CEI South believe that underwriters have a fiduciary duty to act in the best interests of the issuer and/or CEI South ratepayers and may not and will not act in their own financial or economic interest?

t. Please refer to page 25 line 15-24, of the direct testimony of Mr. Chang. Mr. Chang recommends a public SEC registered offering; however, he does not describe the method of the public sale. Will the securitization bonds be offered through a competitive bid/auction or through a negotiated firm commitment underwriting transaction (as further defined below) with a preselected group of underwriters? Please provide and explain the evidence to support what CEI South is proposing.

u. If an SEC registered public offering, according to Mr. Chang's direct testimony, p. 25, lines 19-20, which states an SEC registered public offering "would likely lead to lower overall costs for CEI South's customers," on what basis would CEI South determine that a private placement is preferable to a public offering?

   i. Who would make this decision and when?

   ii. Have recent private placement/144A utility securitization bond offerings priced at higher or lower interest rates (credit spread to relevant benchmarks and relevant comparable corporate securities) compared to SEC registered public offerings? If higher, by how much in basis points per tranche and weighted average life of such tranche?

v. In the sale of bonds by public power authorities and all state and local governments in Indiana and elsewhere (also known as the municipal bond market), financial advisors to bond issuers are prohibited from also being underwriters of the bonds. Moreover, as of 2011, financial advisors in the public power and state and local government market are now prohibited from resigning their role as advisor to act as an underwriter.[1] Because these bonds are the sole obligation of CEI South ratepayers directly and not its shareholders as with traditional utility bonds, would CEI South be willing to restrict Barclays from participating as an underwriter of the bonds to prevent a similar conflict of interest?

w. If CEI South is not willing to make the above restriction, how can it ensure that Barclays will structure, market and price the offering to benefit CEI South ratepayers versus itself in the underwriting process, such as to reduce their financial risk as underwriters, if any, and allow for a quicker sale regardless of the cost to CEI South ratepayers?

x. In connection with public offerings of securities, what is the difference between an underwriter and a placement agent?

y. What is the difference between a "firm commitment" negotiated underwriting and a "best efforts" underwriting? Does CEI South propose that the Issuer will sell the securitization bonds to underwriters in a "firm commitment" underwriting or a "best efforts" underwriting?

   i. In a firm commitment competitive bid, do firms purchase all the bonds at a fixed priced, regardless of having orders from investors for every bond in every tranche?

   ii. In a firm commitment underwriting of bonds, must the underwriters always have orders from investors for every bond in every tranche when the bonds are priced and the underwriting agreement is executed?

   iii. If CEI South proposal is not a competitive bid/auction but a negotiated firm commitment underwriting with a pre-selected group of underwriters, how will those underwriters be selected?

[1] MSRB Rule G-23 - Activities of Financial Advisors

iv. Will the underwriters provide advice to CEI South concerning the structure, marketing, preliminary pricing and final pricing of securitization bonds on which CEI South will rely?

v. Are the underwriters expected to analyze or review other information to assist CEI South in evaluating whether the terms negotiated with the underwriters are in the best interests of CEI South ratepayers?

Objection:

Petitioner objects to the Request on the grounds and to the extent the Request seeks information which is trade secret or other proprietary, confidential and competitively sensitive business information of Petitioner, its Customers, or other third parties. Petitioner has made reasonable efforts to maintain the confidentiality of this information. Such information has independent economic value and disclosure of the requested information would cause an identifiable harm to Petitioner, its Customers, or other third parties whose confidential information is sought. The responses are "trade secret" under law (Ind. Code § 24-2-3-2) and entitled to protection against disclosure. See also Indiana Trial Rule 26(C)(7). All responses containing designated confidential information are being provided pursuant to non-disclosure agreements between Petitioner and the receiving parties. Petitioner objects to producing the information sought in OUCC DR 09.2(k)(2) even pursuant to a non-disclosure agreement with the receiving parties as the information is highly sensitive trade secret information of those parties that would provide competitors of those third parties an unfair advantage in negotiating engagements of a similar nature or responding to future requests for proposal. The information is also irrelevant to this proceeding and not reasonably calculated to lead to the discovery of relevant or admissible evidence and Petitioner objects to producing the information on this basis; the harm to those third parties from disclosure outweighs any likely benefit of producing such confidential information, taking into account the needs of the case and the irrelevance of the information sought in the request. Petitioner further objects to producing the engagement letter with Barclays in response to OUCC DR 09.2(m), even pursuant to a non-disclosure agreement, as it is confidential, proprietary trade secret information of Barclays, the disclosure of which would cause identifiable harm to Barclays, affording its competitors an unfair advantage in negotiating engagements of a similar nature or responding to future requests for proposal. Petitioner further objects to producing the information requested in OUCC DR 09.2(r)i as the identity of buyers in securitizations is not public information and Petitioner is not in possession of the information sought by that Request.

Petitioner further objects to the Request on separate and independent grounds and to the extent that it is premised on legal conclusions that Petitioner has not verified, does not accept, and about which Petitioner offers no legal opinion.

Petitioner further objects to OUCC DR 09.2(v) on the separate and independent grounds and to the extent it is based on the false premise that CEI South ratepayers are the debtors under the securitization bonds.

Petitioner further objects to OUCC DR 09.2(w) on the separate and independent grounds and to the extent it calls for speculation or otherwise implies a set of circumstances that does not currently exist; Barclays has not been engaged as the underwriter for CEI South’s securitization bond offering.

Response:

Subject to and without waiver of the foregoing objections, Petitioner responds as follows:

CEI South has hired Barclays Capital Inc. to act as the Company's lead structuring agent and banking witness. CEI South will pay Barclays an advisory fee once the Commission has declared the record closed in this Cause.

a) No. N/A. Flat fee. N/A.

b) Barclays is engaged as the structuring advisor, though with a broad mandate. Barclays is engaged to review and analyze various structural and financial considerations related to the Securitization, including cash flow modelling; the design of customer revenue requirements; maturity and amortization profiles; the proposed true-up adjustment mechanism; assistance in the preparation and review of the Financing Order; preparation and review of content required for rating agency stress scenarios; support for the submission of Testimony, discovery, pre- and post-hearing activities; and other such matters.

c) See response to 45722 OUCC DR 09-2(b).

d) See response to 45722 OUCC DR 09-2(b).

e) Flat fee for all services of $350,000.

f) Barclays was engaged on March 22, 2022 and the contract will automatically terminate on June 30, 2023. See response to 45722 OUCC DR 09-2(b).

g) Please refer to the response to 45722 OUCC DR 09-2; no fees have been paid to Barclays to date.

h) One of Barclays' services / deliverables as structuring advisor is to develop an Excel-based financial model of the charge to evaluate how rating agencies will view the transaction in relation to their rating criteria and stress testing to achieve AAA ratings.

i) Flat fee for all services. Please refer to the response to 45722 OUCC DR 09-2(b) and (e); flat fee for all services.

j) Yes.

k) Yes.
1) Please see 45722 OUCC DR09-2k1 - CEI South RFP for Structuring Agent--July 2021.pdf.
2) See objection. Responses from those that participated in the RFP are considered confidential, proprietary, trade secret.

l) CEI South relied on internal experience in addition to reviewing recent securitization filings .

m) See objection. The Barclays engagement letter is confidential, proprietary, trade secret information of Barclays.

i. No, Barclays is an independent contractor.

ii. No, Barclays is an independent contractor.

iii. No, Barclays is an independent contractor.

iv. Please refer to the Direct Testimony of Brett Jerasa, page 30, where CEI South has invited the Commission to appoint a representative (either a Commissioner or a senior staff member) to observe the pricing discussions. The Commission has the sole right to review and reject the Issuance Advice Letter if the Commission believes CEI South has not followed the Financing Order and Securitization Act or otherwise does not desire the transaction to proceed. In addition, intervening parties are participating in this adversarial proceeding, and have opportunity to provide input on structuring recommendations within this proceeding. Finally, CEI South is committed to structuring and marketing the bonds to optimize benefits and will uphold the requirements set forth in the Financing Order and Securitization Act.

n) No, CEI South cannot agree. CEI South cannot at this time guarantee that an additional financial modeling RFP would save ratepayers up-front costs. CEI South pursued a competitive process to choose a structuring agent when selecting Barclays.

o) Yes.

p) No. Underwriters will be chosen in a completely separate, competitive RFP process and there is no guarantee that Barclays will be chosen as an underwriter on the securitization bond offering.

q) Barclays is not a fiduciary.

r)

i. See objection. Refer to the response to OUCC DR 09.2(r)ii.

ii. Barclays has participated as an underwriter on previous utility securitizations and the investor types described were chosen based on that experience.

s) See objection.

t) CEI South expects the securitization bonds will be offered through a multi-step syndication and book-building process where the bonds will be broadly marketed and offered to investors, similar in approach to recent utility securitizations.

u) CEI South would evaluate and determine whether to pursue an SEC registered public offering or a private placement offering based on which method would likely be expected to achieve a lower bond cost and therefore increase benefits.

i. CEI South will make that determination with input from the underwriting syndicate and the Commission prior to commencing any investor marketing on the securitization bonds.

ii. There are many factors, including whether a utility securitization is offered in a public or private format, that will impact the pricing of the securitization offering. Market conditions at the time of issuance, the issuing entity, the issuance size, tenor, public vs. private offering, and other factors, can all impact pricing and must be evaluated for each utility securitization prior to coming to market.

v) No; see objection.

w) See objection.

x) Placement agents are more commonly used in relation to private placement or direct placement transactions. Placement agents typically do not purchase or hold the securities – instead, they arrange for the direct transfer of securities from the Issuer to the investors. Underwriters are typically involved in public transactions and purchase the securities from the Issuer before then reselling the securities to investors.

y) A "firm commitment" underwriting typically would require the underwriters to purchase and take down an agreed upon amount of the issued securities, regardless of whether there is sufficient investor demand to resell. In comparison, a "best efforts" underwriting typically requires the underwriters to purchase and take down the issued securities if all securities can then be resold to investors – in which case, typically, either all securities are sold, or no securities are sold. Consistent with recent utility securitizations, CEI South currently anticipates the securitization bonds will be sold using a best efforts approach.

i. Yes. However, please refer to response to OUCC DR 09-2(y) – CEI South currently anticipates the securitization bonds will be sold using a best efforts approach.

ii. No. However, please refer to response to OUCC DR 09-2(y) – CEI South currently anticipates the securitization bonds will be sold using a best efforts approach.

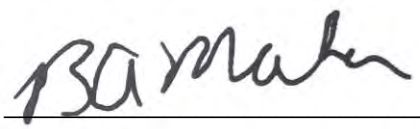
iii. Not applicable – CEI South currently anticipates the securitization bonds will be sold using a best efforts approach.

iv. Yes. However, please refer to response OUCC DR 09-3(b) for limitations on the reliance on such advice.

v. Yes.

AFFIRMATION

I affirm, under the penalties for perjury, that the foregoing representations are true.



Brian A. Maher
Saber Partners, Consultants
Indiana Office of Utility Consumer Counselor

Cause No. 45722
CenterPoint Energy Indiana

August 3, 2022

Date

CERTIFICATE OF SERVICE

This is to certify that a copy of the ***OUCC's Testimony*** has been served upon the following parties of record in the captioned proceeding by electronic service on August 3, 2022.

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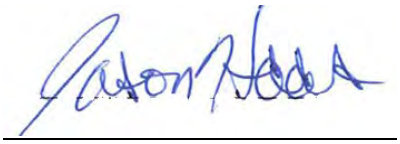

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