

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review of)	
Chapters 4901:1-9, 4901:1-10, 4901:1-21,)	
4901:1-22, 4901:1-23, 4901:1-24, and)	Case No. 06-653-EL-ORD
4901:1-25 of the Ohio Administrative Code .)	
)	

**COMMENTS
OF
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

The Northeast Ohio Public Energy Council ("NOPEC") respectfully submits these Comments to the proposed rules regarding governmental aggregation issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") for comment in its Entry of July 23, 2008 ("Entry").

NOPEC is a regional council of governments established under Chapter 167 of the Ohio Revised Code comprised of approximately 126 member cities, municipalities and townships located in nine counties in northeastern Ohio. NOPEC is a PUCO-certified electricity and natural gas governmental aggregator currently serving approximately 450,000 electric customers and 250,000 natural gas customers. NOPEC is the largest public governmental retail energy aggregator in Ohio and nationwide.

I. PRELIMINARY COMMENTS

Among the energy policies that the General Assembly introduced in Amended Substitute Senate Bill 221 ("SB 221") for the benefit of Ohio's consumers and the State's economy is a specific statutory legal mandate, separate

from the others. It requires the Commission to “encourage and promote large-scale governmental aggregation . . .”.¹ The General Assembly actively chose to establish this legal mandate in Section 4928.20. This section specifically states that that the Commission “shall adopt rules” to actively “encourage and promote governmental aggregation in this state.”

This directive provides the Commission with a unique opportunity to revise and develop new rules for the purpose of encouraging and promoting large-scale governmental aggregation. Based on its placement and language, this section is not merely one of a number of the possibly conflicting aspirational policy goals set forth in Section 4928.02. It is a singular and stand-alone legal mandate to the Commission to actively encourage and promote governmental aggregation in Ohio. All proposed changes referenced herein have a statutory basis within O.R.C. Section 4928.20(K)’s mandate to encourage and promote governmental aggregation. If properly implemented, the Commission can preserve at least one competitive element of an otherwise non-competitive retail electric market in Ohio by ensuring the operation of one or more large-scale governmental aggregations.

Another specific legal mandate from the General Assembly is that the Commission shall consider the effect on large-scale governmental aggregation of any non-bypassable generation charges proposed by a utility within the context of an electricity security plan.² Non-bypassability of all generation charges is critical to NOPEC’s ability to compete and provide competitive generation

¹ See 4928.20(K)

² *Id.* The Commission’s review is limited not to include nonbypassable generation deferrals already authorized for recovery by the utility and approved by the Commission prior to SB 221.

service to NOPEC's half million electric customers in nine counties in northeast Ohio. The critical importance of this issue was recognized by the General Assembly in SB 221. NOPEC now calls on the Commission to address this issue in its rules and to vigorously review this issue in the upcoming electric security plan standard service offer ("SSO") cases to ensure that the regulatory structure to be implemented will permit NOPEC's large scale governmental electricity aggregation program to proceed in 2009 and beyond.

NOPEC respectfully submits these comments to assist the Commission in more effectively encouraging and promoting governmental aggregation.

II. DISCUSSION OF RULES, COMMENTS AND PROPOSED CHANGES

A. 4901:1-21-01; 4901:1-10-01 Definitions.

Chapters 4910:1-10 and 4901:1-21, respectively, define "Governmental aggregation program" as:

"Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years."³

NOPEC believes that this definition is too restrictive. It should be revised to remove the temporal lower and upper term boundaries of one to three years, and should simply recognize that the program should be established for a fixed term, with the ability of aggregation customers to opt-out without charge at least once every three years.

The lower boundary of one year could discourage governmental aggregation. It does not allow for short term supply contracts when the market is

³ See Proposed 4901:1-10-01(P); 4901:1-21-01(T)

not conducive to the governmental aggregator negotiating a longer term contract. This is conceivable in light of at least one proposed plan for a short-term Electric Security Plan (“ESP”)⁴. The effect of this lower limit on the term of a program could constrain an aggregation’s ability to purchase generation in the wholesale market, the purchase of which initially would be linked to the term of an electric utility’s ESP as the price to compare. Based on this possible constraint on large-scale governmental aggregations, NOPEC proposes that this lower bound be removed from the definition.

Presumably, the Commission’s motivation in establishing an upper three year limit in this definition stems from concern that a governmental aggregation customer could be negatively impacted with different return pricing if at the statutory three year opt-out⁵ point the customer chooses to return to taking SSO service from the electric utility while the aggregation program is ongoing. NOPEC believes that this concern would be ameliorated without unreasonably limiting the term of a governmental aggregation program by ensuring that a governmental aggregation has the opportunity to negotiate a favorable supply contract and that the governmental aggregation is not unreasonably constrained by an onerous and unreasonably high utility Provider of Last Resort (“POLR”) charge.

First, if a governmental aggregator is able to enter into a favorable electric supply contract for a term longer than 3 years, and the aggregation customers have the full legal right to opt-out every 3 years without charge, the governmental

⁴ See Electric Security Plan Application of First Energy, Case No. 08-935-EL-SSO, where there could be a short-term interim ESP plan.

⁵ See O.R.C. § 4928.20(D)

aggregator should be able to do so. Such a long-term electric supply contract could be a large benefit to such customers beyond the initial 3 year term. The situation causing the Commission concern is an issue of cause and effect whereby the Commission has attempted to eliminate a potential negative effect on customers by limiting the ability of the governmental aggregation program to extend past the statutory three year opt-out opportunity. However, by doing so, the Commission eliminated the potential benefit to consumers of a longer-term supply contract if the governmental aggregator can trigger a favorably priced long-term contract.

Moreover, this approach does not address the primary cause of this negative effect, which is a non-cost based, unreasonably high POLR charge that would force a governmental aggregation to seek standby service in the market. If the POLR charge is reasonably comparable to the available market rate for the same service and is set to accurately reflect the actual cost of providing standby service, then a governmental aggregator will not be motivated to seek standby service out in the market. For example, NOPEC believes that First Energy has calculated its POLR charges above the comparable market rate for the same service and the true cost to provide the POLR service. In contrast, for example, American Electric Power has traditionally developed a more reasonable rate for POLR service. As an unreasonably high charge for POLR service would essentially force a governmental aggregator to seek standby service in the marketplace opening up the possibility that customers could potentially return to the electric utility at the higher market rates, NOPEC proposes that the

Commission consider and address the construction of the utility's POLR service as the primary cause of this potential negative customer impact.

NOPEC proposes that this issue is more effectively addressed in Section 4901:1-1-32, which is addressed later in these comments.

B. 4901:1-10-32 Cooperation with certified governmental aggregators.

Cooperation between the electric utility and the governmental aggregator will be critical to the state's directive to the Commission to encourage and promote governmental aggregation, and this rule should explicitly direct the electric utilities to satisfy this statutory directive. NOPEC recognizes the Commission's efforts to promote cooperation between the utility and certified governmental aggregators in this rule, and, to that end, proposes the following revisions and additions to further encourage and promote governmental aggregation through cooperation between the governmental aggregator and the utility:

4901:1-10-32(A)(1)

The information provided by the utility in Section (A) of the rule is necessary for NOPEC to comply with the requirements of Section 4928.20 as well as participate in Ohio's electricity marketplace. It is similarly necessary that the governmental aggregation obtain this information in useable format. This issue is two-fold.

First, the utility should provide load data to the governmental aggregation both for customers individually and for the aggregation's load as a whole. In the past, the utility has only deemed it their responsibility to provide

load data for each customer individually. This places the burden on the governmental aggregator to bear the costs of aggregating this load to make the information usable for assessing the overall load of the governmental aggregation's customers. Second, all load data and other information should be provided to the governmental aggregation in spreadsheet, word processing, or non-image-based format compatible with personal computers. These two changes will revise this rule to more effectively encourage and promote governmental aggregation.

Therefore, NOPEC proposes to revise this language as follows:

(1) An updated list of names, account numbers, service addresses, billing addresses, rate codes, percentage of income payment plan codes, load data, BOTH FOR EACH INDIVIDUAL CUSTOMER AND FOR THE AGGREGATION'S LOAD AS A WHOLE, and other related customer information, TO BE PROVIDED IN SPREADSHEET, WORD PROCESSING, OR NON-IMAGE-BASED FORMAT COMPATIBLE WITH PERSONAL COMPUTERS AND consistent with the information that is provided to other electric services companies.

4901:1-10-32(A)(3)

This rule proposes that the utility provide to the governmental aggregation "[O]n a best effort basis, an identification of mercantile customers." "Mercantile customers" is a defined term within proposed Rule 4901:1-1-01.⁶ As "mercantile customer" is a defined term within the rules, the utility will have an equal if not better basis to identify commercial or industrial customers that fit within this

⁶ See 4901:1-1-01(R) defining "Mercantile Customer" as:

a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

defined class of customers. This language should be revised to require the utility to identify mercantile customers as defined within the rules; specifically the words “On a best effort basis,” should be removed from the beginning of the clause in this rule.

4901:1-10-32(B)

NOPEC believes that this provision is responsive to the General Assembly’s mandate to encourage and promote large-scale governmental aggregation.

4901:1-10-32(D)

NOPEC appreciates the Commission recognition of the switching fee as a key issue, and believes that this provision directly responds to the General Assembly’s mandate to encourage and promote large-scale governmental aggregation. No fee of any sort should be assessed to customer accounts that switch to or from a governmental aggregation at any time.

Additionally, large-scale governmental aggregations should have the opportunity to enroll customers within its aggregation program at any time during the year. It is unreasonable and does not encourage and promote governmental aggregation for a utility’s tariff to place seasonal restrictions upon when customers can enroll in an aggregation program to be its service provider. So-called “stay-out” provisions or any similar provision that accomplishes this same result discourage large scale governmental aggregation, and discourage customers from taking service from the aggregation. To effectuate this point, NOPEC proposes the following additional language within Section 4901:1-10-32(D):

(D) Unless a customer notifies the ~~EDU~~ electric utility of the customer's intent not to join a governmental aggregation by responding to the confirmation notice or providing some other notice as provided by the ~~EDU's~~ electric utility's tariffs, the ~~EDU~~ electric utility shall switch customer accounts to or from a governmental aggregation under the same processes and time frames provided in published tariffs for switching other customer accounts. THERE SHALL BE NO LIMITATIONS ON WHEN DURING THE YEAR A CUSTOMER MAY SWITCH FROM THE ELECTRIC UTILITY TO A GOVERNMENTAL AGGREGATION, AND A switching fee shall not be assessed to customer accounts that switch to or from a governmental aggregation.

4901:1-10-32 “(E)” New Rule To Be Inserted as Section (E)⁷

While proposed rule 4901:1-10-33(H) effectively addresses the situation where a customer partially pays their bill in a manner that encourages and promotes governmental aggregation, it does not address the situation where there is no payment by a customer. Section (H) still results in a bad debt expense to be incurred by the governmental aggregator without any practicable recourse unlike the electric utility.

NOPEC submits that the only effective solution is to require the electric utility to purchase 100% the accounts receivable of a governmental aggregator's CRES provider. It is unfair and unreasonable to leave this bad debt stranded with the governmental aggregator if the electric utility has bad debt tracker mechanisms for generation (proposed, for example, in FirstEnergy's ESP case as a non-bypassable uncollectible generation cost rider) in place or proposed to collect its generation cost uncollectibles. Further, stranding these uncollectibles with the governmental aggregation also would unfairly disadvantage the governmental aggregation in comparison to the utility's SSO. Finally, this approach of requiring the utility to purchase 100% the receivables of the

⁷ This section most appropriately should be inserted as a new section (E), with the remaining other sections to be moved to the next numeral available within 901:10-1-32.

governmental aggregation's CRES provider has operated very successfully for large Ohio natural gas utility customer choice programs.⁸ There is no reason why it should not also apply for competitive electric services.

Accordingly, NOPEC proposes the following language to address this issue:

(E) IN THE EVENT THAT A LARGE-SCALE GOVERNMENTAL AGGREGATOR OR ITS CRES PROVIDER ELECTS TO ENTER INTO A SUPPLIER AGREEMENT WITH AN ELECTRIC UTILITY THAT INCLUDES CONSOLIDATED BILLING AS SET FORTH UNDER RULE 4901:10-1-33, THE SUPPLIER AGREEMENT SHALL ALSO INCLUDE, AT THE ELECTION OF THE GOVERNMENTAL AGGREGATION OR ITS CRES PROVIDER, A PROVISION FOR THE PURCHASE BY THE ELECTRIC UTILITY OF 100% OF THE ACCOUNTS RECEIVABLE FOR COMPETITIVE RETAIL ELECTRIC SERVICE PROVIDED THROUGH THE GOVERNMENTAL AGGREGATION AND INCLUDED WITHIN THE CONSOLIDATED BILLING ARRANGEMENT.

4901:1-10-32(G)

While intended to encourage and promote governmental aggregation, this provision has serious unintended consequences both for the governmental aggregation's customers and for the aggregation's ability to procure a competitive supply of wholesale electricity on the market.⁹ The rule operates to allow a governmental aggregation to elect on behalf of its customers not to receive standby service from an electric utility operating under an approved electric security plan during the governmental aggregation program. The penalty associated with this election would be that if a customer returns to the utility for retail service during the governmental aggregation program, that customer would

⁸ See P.U.C. Case No. 03-1127-GA-UNC

⁹ The proposed revisions within this section should be considered in conjunction with NOPEC's comments regarding the definition of Governmental Aggregation Program on p. 4 *supra*.

be required to pay the market price of power along with additional charges as opposed to the ESP price.

The issue that could potentially arise would be as follows. If the utility's proposed three-year ESP provides for a two year plan with an option to the Commission to reconsider and either renew or terminate the ESP in the third year¹⁰, then the Commission could terminate the ESP prior to the end of a three year aggregation program. Presumably, if the Commission terminated the ESP at that time, it would be because the Market Rate Offer ("MRO") would provide a lower standard service offer ("SSO") rate. For the governmental aggregation itself, this option directly impedes the aggregation's ability to obtain a supply contract for longer than the two year definite, pre-option period.

The issue for the aggregation's customers is that if the ESP is terminated at the beginning of the third year by the Commission, that would be an event outside of the governmental aggregator's control. If the MRO price then is lower than the price that could be procured by the government aggregation, it would be in the best interest of the governmental aggregation's customers to opt-out of the aggregation and return to the utility's SSO price. NOPEC is certain that the Commission, in such an event, did not intend the returning customer to pay the higher market price as opposed to a lower SSO price solely because of a decision by the Commission over which the governmental aggregator and its supplier have no control. The reality of the wholesale power market is that governmental aggregators cannot seek supply without a firm price to beat under an ESP or MRO. Thus, a three year ESP proposal with a one year early termination option

¹⁰ See Electric Security Plan Application of First Energy, Case No. 08-935-EL-SSO,

by the Commission effectively limits governmental aggregators to a two-year program. If something happens to the SSO price wholly outside of the aggregator's control, then it unfairly places risk on the governmental aggregation and disadvantages the aggregator's customers because they could then be penalized for returning to the utility and would not be able to take advantage of the utility's potentially lower SSO rate.

To encourage and promote governmental aggregation, NOPEC proposes a distinction be made as to return pricing within the rules for situations where an ESP terminates, either by its own terms or by action of the PUCO or the Ohio Supreme Court. In these situations, which are completely outside the control of the governmental aggregator and its supplier, the governmental aggregation's customers should be able to return to the new standard SSO price approved by the Commission regardless of whether the governmental aggregation sought to obtain standby service from the utility or in the marketplace. The higher market rate method should apply only if there is a default by the CRES supplier or the governmental aggregator in supplying the electricity to the aggregation customer, over which both have control, as distinguished from a regulatory or court order over which they have no control or the ESP plan terminating by its own terms. Accordingly, NOPEC proposes that the following language be added:

(G) AN ELECTRIC UTILITY SHALL PROPOSE AND OFFER ANY STANDBY OR RELATED CHARGE IN A MANNER THAT DOES NOT INHIBIT OR DISCOURAGE LARGE SCALE GOVERNMENTAL AGGREGATION. If a governmental aggregator notifies the commission of its election to not receive standby service from the electric utility that is operating under an approved electric security plan during the governmental aggregation program, the electric utility shall not

charge any customer that is part of that governmental aggregation for standby service. However, the electric utility shall charge any customer that returns to the electric utility for retail electric service during the governmental aggregation program the market price of power incurred by the electric utility to serve that customer plus any amount attributable to the electric utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve that customer, unless THE ELECTRIC SECURITY PLAN TERMINATES BY ITS OWN TERMS, OR IS TERMINATED OR MODIFIED MATERIALLY BY AN ORDER OF THE COMMISSION OR THE OHIO SUPREME COURT OR such customer becomes ineligible pursuant to paragraphs (E)(1)(a) or (E)(1)(g) of rule 4901:1-21-17 of the Administrative Code, or any customer who moves within the aggregation boundaries where the electric utility considers the customer that is moving to be a new customer. IF THE UTILITY'S ELECTRIC SECURITY PLAN TERMINATES BY ITS OWN TERMS OR IS TERMINATED OR MODIFIED MATERIALLY BY AN ORDER OF THE COMMISSION OR THE OHIO SUPREME COURT, THEN THE CUSTOMERS OF A GOVERNMENTAL AGGREGATION MAY RETURN TO THE ELECTRIC UTILITY FOR RETAIL ELECTRIC SERVICE AT THE ELECTRIC UTILITY'S THEN CURRENT STANDARD SERVICE OFFER PRICE.

4901:1-10-32(I) New Section

The purpose of Rule 4901:1-10-32 generally is to establish by rule the principle that an electric utility must cooperate with a governmental aggregator. NOPEC believes that only through cooperation between the electric utility and large-scale governmental aggregations can the issue of deferrals be addressed in a manner that will allow governmental aggregations to effectively participate in the marketplace. It is a mathematical certainty that if a utility is allowed to defer a portion of its generation costs, while a governmental aggregator is required to develop their rate based on full and actual cost of generation purchased in the market, there is no semblance of parity between these market participants.

If the Commission is to truly encourage and promote governmental aggregation, a solution must be implemented to address the generation deferral issue. NOPEC is certainly not seeking a subsidy as might be suggested by certain Ohio electric utilities, but rather, seeks to develop a practical solution to create a level economic playing field on which the large scale governmental aggregator may fairly compete for its member's customers with the utilities' ESP rates. In its Initial Comments responding to the Commission's ESP rules, NOPEC proposed incorporating a two-part mechanism into the utility's ESP to equalize the impact of a proposed deferral between the utility and the governmental aggregator as a remedy.¹¹ NOPEC proposes a two-part mechanism to combine a "Large Scale Governmental Aggregation Generation Credit" ("GAGC") and "Combined Deferral Pool" ("CDP"). The GAGC and CDP is a practical solution to the deferral issue that would effectually allow large-scale governmental aggregators to utilize the exact same mechanism as the utility, the deferral of a specified portion of generation costs, to promote short term price stability and market parity.

Implementation of the GAGC and CDP would require cooperation between the electric utility and the governmental aggregator, and this can be instituted in this rule. Operationally, NOPEC perceives the GAGC and CDP operating as follows:

- These mechanisms would be inoperative unless a utility proposed and the Commission approved a deferral under O.R.C. Section 4928.144.

If the Commission approves a deferral:

¹¹ See Comments of NOPEC, p. 5-8 (filed July 22, 2008)

- The GAGC credited to the governmental aggregation's customers would equal the value of the credit approved by the Commission. Using a hypothetical example, if a utility's average base generation price for 2009 is 7.5 cents/KWh, but the charge paid by the utility's customer in 2009 will be a phased in price of 6.75 cents/KWh, then the 0.75 cents/KWh that is deferred into the future for the utility's customers also would be deferred for the governmental aggregation customers through the GAGC.
- The amount deferred under the GAGC would then flow through to the CDP, which would be operated and overseen by the utility. Any revenues from the potential securitization of the CDP would be retained by the utility.
- An accounting of the value deferred by the governmental aggregator's customers under the GAGC would be maintained by the utility and would be overseen by the Commission.
- Because the values deferred through the GAGC would flow through to the CDP overseen by the utility, the governmental aggregator's customers would be required to repay the deferred amount on the same terms established by the utility for its own SSO customers.

To effectuate the GAGC and CDP, as explained above, NOPEC proposes the following language be incorporated into Rule 4901:1-10-32 as a new section:

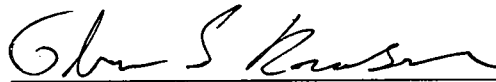
(I) EACH ELECTRIC UTILITY THAT PROPOSES A GENERATION-RELATED DEFERRAL PURSUANT TO SECTION 4928.144 OF THE OHIO REVISED CODE WHICH IS APPROVED BY THE COMMISSION SHALL COOPERATE WITH GOVERNMENTAL AGGREGATORS IN DEVELOPING A COMBINED DEFERRAL POOL MECHANISM TO BE MAINTAINED BY THE UTILITY, WHICH WILL BE THE REPOSITORY FOR ALL GENERATION-RELATED DEFERRALS APPROVED BY THE COMMISSION PURSUANT TO SECTION 4928.144 OF THE REVISED CODE. THE COMBINED DEFERRAL POOL WILL BE ADMINISTERED BY THE UTILITY IN CONJUNCTION WITH A GOVERNMENTAL AGGREGATION FULL GENERATION CREDIT, WHICH SHALL BE OVERSEEN BY THE GOVERNMENTAL AGGREGATION, THE ELECTRIC UTILITY, AND THE COMMISSION, AND SHALL OPERATE TO DEFER A PORTION OF THE GOVERNMENTAL AGGREGATION CUSTOMER'S COST OF GENERATION EQUAL TO THE FULL AMOUNT OF THE GENERATION CHARGE(S) APPROVED TO BE DEFERRED BY THE UTILITY INTO THE COMBINED DEFERRAL POOL. THE AMOUNT CREDITED THROUGH THE GOVERNMENTAL AGGREGATION

GENERATION CREDIT SHALL BE RECOVERED FROM THE GOVERNMENTAL AGGREGATION CUSTOMERS ON THE SAME TERMS AS THOSE SET FORTH BY THE UTILITY FOR RECOVERY OF THE GENERATION-RELATED DEFERRALS FROM ITS OWN CUSTOMERS. THE UTILITY SHALL KEEP AN ACCOUNTING OF THE COMBINED DEFERRAL POOL.

III. CONCLUSION

NOPEC appreciates the opportunity to work with the Commission to encourage and promote large scale governmental aggregation in the State of Ohio. NOPEC respectfully requests the Commission to consider and adopt its recommendations in this proceeding.

Respectfully submitted,



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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/12/2008 3:52:06 PM

in

Case No(s). 06-0653-EL-ORD

Summary: Comments of Northeast Ohio Public Energy Council electronically filed by Teresa Orahod on behalf of Northeast Ohio Public Energy Council