BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code.	))))	Case No. 12-1924-EL-ORD

REPLY COMMENTS
OF
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL

The Northeast Ohio Public Energy Council ("NOPEC") respectfully submits these Reply Comments to the initial comments submitted by other interested parties on January 7, 2013 regarding the proposed rules regarding competitive retail electric service that were issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") for comment in its Entry dated November 7, 2012 ("Entry").

NOPEC is a regional council of governments established under Chapter 167 of the Ohio Revised Code, and is the largest governmental retail energy aggregator in the State of Ohio. Comprised of 162 communities in the ten (10) northeast Ohio counties of Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull, Portage and Huron, NOPEC provides governmental aggregation electric service to approximately 500,000 retail electric customers located in the service territories of The Cleveland Electric Illuminating Company ("CEI") and Ohio Edison Company ("OE").

I. REPLY COMMENTS

A. The Commission should reject the proposed definition of "small commercial customer" as proposed in the Initial Comments of The Retail Energy Supply Association and Interstate Gas Supply, Inc. as it contradicts Ohio law.

In their initial comments to the proposed CRES rules, the Retail Energy Supply Association and Interstate Gas Supply, Inc. (collectively "RESA") urged the adoption of a new

definition of "small commercial customer" in Ohio Administrative Code ("OAC") 4901:1-21-01(II). Specifically, RESA proposes to define a small commercial customer as "a commercial customer that has a demand of 25 kilowatts or less"—a definition that focuses on a customer's demand rather than usage. NOPEC is concerned because RESA's proposed definition contradicts current Ohio law, moreover, it would result in a near impossible standard for a governmental aggregator to comply with related to the distinction between "mercantile" and "non-mercantile" customers.

By proposing to define a small commercial customer using a demand standard rather than a consumption standard, RESA ignores the statutory underpinnings of the current definition. Currently, a small commercial customer is defined in 4901:1-21-01(II) as "a commercial customer that is not a mercantile customer." This definition relies solely on the statutory definition of a "mercantile customer" in Ohio Revised Code ("ORC") 4928.01(A)(19)—namely, that a "mercantile customer" is "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." Thus, the Ohio General Assembly chose to categorize customers based upon their overall consumption of electricity, not their demand, when it enacted HB5.

Just as importantly, the General Assembly created essentially two categories of commercial customers: (1) mercantile customers (those using more than 700,000 kWh of electricity (and national accounts involving multiple facilities in one or more states); and (2) other commercial customers (currently defined to include all non-mercantile commercial customers). "Non-mercantile" customers are eligible to be enrolled in NOPEC's and other governmental opt-out aggregation programs. "Mercantile" customers are not permitted to be

enrolled in NOPEC's and other opt-out governmental aggregation programs. There are no other classes of commercial customers other than the mercantile and non-mercantile distinction set forth in ORC 4928.01(A)(19) for purposes of determining eligibility for enrolment in opt-out governmental aggregation program. Respecting this statutory scheme, the Commission wisely chose not to create any new or additional classification for commercial customers in the proposed rules. Instead, the OAC definition focuses solely on the mercantile vs. non-mercantile distinction, not based on demand characteristics. The Commissioner's rule proposal did not suggest a change to the definition of a small commercial customer—a definition currently consistent with the statutory scheme adopted by the General Assembly.

In its comments, RESA urges the Commission to overstep its authority and promulgate a definitional rule that departs from the statutory definition adopted by the Ohio General Assembly. The proposed definition seeks to classify commercial customers in a manner that would create multiple classifications of commercial customers not contemplated in the Ohio Revised Code. In fact, under RESA's proposal, a number of commercial customers would meet neither the statutory definition of a mercantile customer nor RESA's proposed definition of a small commercial customer. RESA's proposal provides no guidance as to how these commercial customers should be classified or treated, or the Commission's statutory basis for making such a classification. In any event, RESA's proposal is inconsistent with the definitions adopted in the Ohio Revised Code, which are based on consumption rather than demand. Because RESA's proposal seeks to adopt a definition inconsistent with existing law, it must be rejected.

Moreover, from a practical standpoint, the adoption of RESA's definition also would create a new nearly impossible administrative scheme for a governmental aggregator such as NOPEC to implement. It would also create unnecessary confusion throughout the relevant

sections of the OAC because a number of commercial customers would meet neither the statutory definition of a mercantile customer nor RESA's proposed definition of a small commercial customer. A number of provisions in the OAC use the terms non-mercantile customer and small commercial customer interchangeably. However, the RESA proposal provides no guidance how these provisions would be impacted by creating different classifications of commercial customers—some based on electric usage and others based on demand. This would create substantial difficulty to a governmental aggregation attempting to determine which customers are eligible for opt-out aggregation and which are not because the EDU-provided eligible customer GAGG files for governmental aggregators do not differentiate customers based on the electric demand characteristics of each customer.

The Commission is under a statutory duty to "encourage and promote large scale aggregation."[1] RESA also fails to explain what the potential impact of this definition might be on large-scale governmental aggregation. NOPEC believes it would have a negative effect on large scale governmental aggregation and should be rejected on this basis, as well as being patently contrary to ORC 4908.01(A)(19).

B. <u>Contrary to the Initial Comments of Direct Energy Services, LLC and Direct Energy Business, LLC, a governmental aggregator should not be required to give notice to all customers of their right to opt-out every two (2) years.</u>

Direct Energy Services, LLC and Direct Energy Business, LLC propose that OAC 4901:1-21-17(B) should be modified to require a governmental aggregator to give notice to all aggregation participants of their right to opt-out of the aggregation every two years. This proposal, however, runs contrary to ORC 4928.20(D), which provides that any person enrolled in the aggregation program has the opportunity to opt-out without charge every *three* years. The three year opt-out term for a governmental electric aggregate was adopted in SB221, and

[1] *See* ORC 4928.20(K)

replaced the prior two year opt-out period contained in SB3. The Commission does not have the authority to modify the statutory three year requirement.

II. CONCLUSION

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

Respectfully submitted,

Glenn S. Krassen
BRICKER & ECKLER LLP
1001 Lakeside Avenue East, Suite 1350
Cleveland, Ohio 44114
Telephone: (216) 523-5469
Facsimile: (216) 523-7071
E-mail: gkrassen@bricker.com

Matthew W. Warnock
Thomas W. Siwo
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2388
Facsimile: (614) 227-2301

Attorneys for Northeast Ohio Public Energy Council

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing REPLY COMMENTS of THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL was served upon the parties of record listed below this 6th day of February 2013 *via* electronic mail.

Glenn S. Krassen

Glenn S. Krassen

Jennifer.Lause@directenergy.com
mswhite@igsenergy.com
vparisi@igsenergy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com
amy.spiller@duke-energy.com
haydenm@firstenergycorp.com
scasto@firstenergycorp.com
barthroyer@aol.com
gary.a.jeffries@dom.com
mhpetricoff@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
burkj@firstenergycorp.com
cdunn@firstenergycorp.com
kern@occ.state.oh.us
stephanie.chmiel@thompsonhine.com
stnourse@aep.com
mjstatterwhite@aep.com
judi.sobecki@dplinc.com
drinebolt@ohiopartners.org
cmooney@ohiopartners.org
barbalex@ctel.net
eagleenergy@fuse.net

6085999v3

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/6/2013 4:29:22 PM

in

Case No(s). 12-1924-EL-ORD

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