BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market.	))	Case No. 12-3151-EL-COI

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S APPLICATION FOR REHEARING

Glenn S. Krassen (Reg. No. 0007610)
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216)523-7071
E-mail:gkrassen@bricker.com

Dane Stinson (0019101)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone: (614) 227-4854
Facsimile: (614) 227-2390
Email: dstinson@bricker.com

Attorneys for Northeast Ohio Public Energy Council

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market.	))	Case No. 12-3151-EL-COI

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S APPLICATION FOR REHEARING

The Northeast Ohio Public Energy Council ("NOPEC"), through counsel and pursuant to R.C. § 4903.10, and Rule 4901-1-35, Ohio Admin. Code, hereby requests rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio ("Commission") in this proceeding on March 26, 2014 ("Order"). NOPEC submits that the Commission's Order is unlawful and unreasonable based on the following grounds:

A. THE COMMISSION'S DEFINITION AND MEASUREMENT OF "EFFECTIVE COMPETITION" IS UNREASONABLE AND UNLAWFUL.

1. A Rule Adopted by the Commission that Does Not Comply with R.C. § 119.01(I) is Unlawful and Invalid. R.C. § 119.02.

2. The Measurement Whether Customers are "Engaged" is Void for Vagueness on its Face in Violation of the Due Process Protections of the Ohio and United States Constitutions.

3. The Construction of the Term "Engaged" as Set Forth in Former-Chairman Snitchler's Concurring Opinion is Unlawful Because it Conflicts with Legislative Intent.

B. THE ORDER UNREASONABLY DEFERS TO THE MARKET DEVELOPMENT WORKING GROUP THE ISSUE OF WHETHER SHOPPING CUSTOMERS WHO MOVE TO A NEW ADDRESS MUST FIRST RETURN TO THE SSO.

C. THE COMMISSION'S ORDER IS UNLAWFUL INASMUCH AS IT FAILS TO REQUIRE THE EDU TO INCLUDE GOVERNMENTAL AGGREGATORS' NAMES OR LOGOS ON THE EDU'S BILL.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

During the course of its investigation in this proceeding, the Commission sought comments (Entry, June 9, 2013, at 2), and Staff subsequently sought input in various workshops (*e.g.*, Agenda, July 30, 2013; attached as Attachment A) regarding barriers to "a fully functional competitive retail electric service market." As a part of the workshop process, Staff agreed with certain stakeholders, including NOPEC, that the applicable statutory standard in Ohio was not the creation of a "fully functional competitive" market; but rather the creation of "effective competition,"[1] as recognized in R.C. § 4928.02(H) and throughout R.C. Ch. 4928.[2]

Ohio's current regulatory paradigm in the retail electric industry provides for "effective competition" by offering Ohio's consumers three choices under which they may receive electric service: (1) through electric distribution utilities' ("EDUs") standard service offer ("SSO") (R.C. § 4928.141), (2) through communities that have adopted opt-out governmental aggregation programs (R. C. § 4928.20), and (3) through the bilateral contracts of competitive retail electric service ("CRES") providers (R.C. § 4928.08).

In its Order, the Commission defined "effective competition," a statutory term of art, as:

1. participation in the market by multiple sellers so that an individual seller is not able to influence significantly the market price of the commodity;
2. participation in the market by informed buyers;
3. lack of substantial barriers to supplier entry into the market;
4. lack of substantial barriers that may discourage customer participation in the market; and

[1] See, *e.g.*, Staff's Market Development Work Plan, at 9.

[2] The Ohio General Assembly repeated this statutory standard in R.C. §§ 4928.04, 4928.06, 4928.35, 4928.37, and 4928.40.

5. sellers offering buyers a variety of CRES products.

Emphasis supplied. Order, at 8-9. The Order proceeded to adopt the following measurements as indicators of "effective competition:"

1. number of Commission-certified CRES providers in Ohio;
2. number of Commission-certified CRES providers by EDU service territory;
3. number of active CRES providers by CRES service territory;
4. number of customers shopping by class, by EDU service territory;
5. percentage of load shopping by class, by EDU service territory;
6. whether EDUs have at least structural separation; and
7. ***whether customers are engaged*** and informed about the products and services they receive.

Emphasis supplied. Order, at 9. In the text of its Order, the Commission requires the EDUs to submit this measurement data to Staff by the beginning of the third quarter after issuance of the Order, and for Staff to post this measurement data quarterly on the Commission's web page. The Order does not explain what data is indicative that customers are "engaged" in the market despite certain parties', including NOPEC's, requests that it do so.[3] NOPEC Initial Comments to Staff's Proposed Market Development Work Plan (February 6, 2014). Instead, without discussion, the Order merely finds that the measurement is "appropriate." Order, at 9.

II. GROUNDS FOR REHEARING

A. THE COMMISSION'S DEFINITION AND MEASUREMENT OF "EFFECTIVE COMPETITION" IS UNREASONABLE AND UNLAWFUL.

1. A Rule Adopted by the Commission that Does Not Comply with R.C. § 119.01(I) is Unlawful and Invalid. R.C. § 119.02.

[3] Indeed, in its Market Development Work Plan ("Work Plan"), which recommends adoption of the measurements, Staff admits that the extent to which customers are "engaged" is not readily quantifiable, and the Work Plan's Appendix B, which lists the data EDU's are to submit, failed to include any data that would indicate customers' level of engagement.

By adopting the definitions and measurements of "effective competition," a statutory term of art, the Commission engaged in rulemaking. Order, at 8-10. Indeed, R.C. § 4928.06, specifically requires the Commission to issue rules for implementing the provisions of R.C. § 4928.02, including R.C. § 4928.02(H). The Commission is not authorized to engage in rulemaking by adjudication as its Order, standing alone, would do. Rather, the Commission is bound to promulgate rules for filing and review by the Joint Committee on Agency Rule Review ("JCARR"), the Ohio Secretary of State, and the Ohio Legislative Service Commission. See R.C. §§ 119.01(A) and (I) and 111.15(D) and (E). Accordingly, the Order's definition and measurement of "effective competition" is invalid, and of no force and effect, unless or until adopted in compliance with this statutory rule-making process, including the opportunity for JCARR to seek invalidation of the proposed rule because it conflicts with legislative intent, as discussed further below.[4] See R.C. § 119.03(I).

2. The Measurement Whether Customers are "Engaged" is Void for Vagueness on its Face in Violation of the Due Process Protections of the Ohio and United States Constitutions.

As stated previously, the Commission's Order does not define what it means by the term "engaged" and also offers no objective criteria to make this measurement. Indeed, Staff has not included any data in Appendix B to its Work Plan to attempt to measure whether a consumer is "engaged." Rather, Staff explains:

> Measuring the extent to which customers are engaged and informed customers is not readily quantifiable. However, the Commission and all participants should actively strive to ensure that customers are engaged and well informed.

[4] NOPEC is aware that the Commission has opened a docket (Case No. 14-485-EL-ORD) to carry out the directives of this Order; however, rules have not yet been promulgated for comment, and it is unclear whether the Commission intends to include the definitions and measurements of "effective competition" as a part of that proceeding.

Work Plan, at 10. Moreover, in approving the measurement, the Commission did not address stakeholders' concerns with the vagueness of the rule, but summarily found that the measurement was "appropriate" and adopted Staff's recommendation. Order, at 9.

A statute or rule is impermissibly vague if it (1) fails to provide sufficient notice to permit compliance by persons of ordinary intelligence and (2) is not specific enough to prevent official arbitrariness or discrimination in its enforcement. See *Norwood v. Horney*, 110 Ohio St.3d 353, 2006 Ohio 3799, 853 N.E.2d 1115, P 84, citing *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903. Although the Commission adopted Staff's recommendation, the participants in this proceeding have been given absolutely no notice as to how they "should actively strive to ensure that customers are engaged." Nor is the language specific enough to prevent arbitrary enforcement. In fact, as evidenced even by Staff's inability to explain the measurement in its Work Plan, the language sets forth no standard, is "substantially incomprehensible," and thus is unconstitutionally vague. *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005 Ohio 2166, 826 N.E.2d 811, P 19; *Hoffman Estates*, 455 U.S. at 495, 102 S.Ct. 1186, 71 L.Ed.2d 362, fn 7.

NOPEC respectfully requests that the unconstitutionally vague language be stricken from the proposed rule, or that the Commission afford the stakeholders their due process rights and provide notice of the specific data to be measured under the standard to permit their compliance and ensure non-arbitrary enforcement. In this vein, NOPEC urges the Commission to focus on the objective standards under which it can ascertain if customers are informed of their choice in electric supply, and adopt the following measurement:

- Information provided to consumers regarding their choice of electric suppliers by electric distribution utilities, competitive retail electric suppliers, governmental aggregators, the Ohio Consumers' Counsel, and Commission Staff.

See NOPEC's Initial Comments to Staff's Proposed Market Development Work Plan (February 6, 2014).

3. The Construction of the Term "Engaged" as Set Forth in Former-Chairman Snitchler's Concurring Opinion is Unlawful Because it Conflicts with Legislative Intent.

The difficulty with the vagueness of the Order's explanation of the term "engaged" is that undue reliance may be placed on former-Chairman Snitchler's[5] construction of the term in his concurring opinion, which was not accepted by the majority of Commissioners. See Snitchler, concurring, at 3-5. In fact, former-Chairman Snitchler's treatment of the term was not made in the context of measurements for "effective competition" (which recognizes the statutorily prescribed EDU SSO supply option), but "as an alternative to continued SSO service" in the context of a fully functional market (in which the EDU SSO has "become moot") and consumers are required to "engage in the shopping process" among only CRES providers. *Id.* In other words, under former-Chairman Snitchler's analysis, customers are "engaged" in the market only when they no longer have the EDU SSO available to them.

Former Chairman Snitchler's rationale is based upon the same theories advanced by Interstate Gas Supply's ("IGS") position in the proceeding governing Columbia Gas of Ohio's exit from the merchant function,[6] and that IGS offered in this proceeding.[7] In the *Columbia Exit*

---

[5] Subsequent to the issuance of the March 26, 2014 Order, the former Chairman entered the private practice of law.

[6] *In re Application of Columbia Gas of Ohio*, Case Nos. 12-2637-GA-EXM, et al., (Order, January 9, 2013), at 8 ("*Columbia Exit Case*"); *Columbia Exit Case*, OGMG/RESA Exhibit 3, Parisi Testimony, at 4-7.

[7] See IGS Supplemental Comments in this proceeding (July 8, 2013), at 4-7; NOPEC Initial Comments to Staff Development Work Plan (February 6, 2014). In its comments, IGS relies on the theory of "status quo bias," which posits that customers tend to remain with their current supplier regardless of other opportunities available to them. IGS theorizes that the SSO and opt-out aggregation programs represent the status quo in Ohio's electric market and encourage customers to remain "disengaged."

IGS reasons that customers participating in an opt-out governmental aggregation are not engaged in the market because "the customers' community makes the choice of a preferred supplier for the customers." Under IGS's theory, SSO customers are not engaged because they have not made an affirmative decision to keep the SSO. According to IGS, true engagement would require customers to be forced from the status quo and affirmatively

Case, IGS opined that the legislature intended that "once effective competition exits [in the natural gas industry], consumers will no longer be inactive or passive recipients of the commodity services," (*e.g.* the local distribution company's standard offer), and that "[i]n a full exit, customers would be required to ***engage*** with the market in order to get commodity service." *Columbia Exit Case*, OGMG/RESA Exhibit 3, Parisi Testimony, at 4-6 (emphasis supplied).

Although NOPEC does not agree with this theory as applied to either the natural gas or electric industry, it is tragically flawed when applied to the electric industry. R.C. Ch. 4929, which regulates the natural gas industry, may not technically mandate a standard service offer on its face. On the other hand, R.C. Ch. 4928, specifically does mandate the standard service offer (R.C. § 4928.14), which the Commission cannot discard.

Former-Chairman Snitchler's concurrence does not recognize the current legislatively created regulatory paradigm in Ohio which defines "effective competition" in terms of electric supply service being offered through the EDU SSO, opt-out governmental aggregation, and CRES providers' bilateral contracts. If accepted, his construction of the term "engage" would be unlawful as contrary to the legislatively mandated paradigm. Moreover, because it conflicts with legislative intent the language would not withstand JCARR scrutiny. R.C. § 119.03(I). Whether the SSO should be eliminated on philosophical grounds or continued as a consistently low-cost alternative supply option available for the benefit of consumers should properly be reserved for the General Assembly.

NOPEC respectfully renews its requests that the measurement assessing whether customers are "engaged" be stricken from the proposed rule.

---

select a supplier. IGS's theory violates R.C. §§ 4928.141 and 4928.20 because it would eliminate the statutorily prescribed EDU SSO and opt-out governmental aggregation as alternative supply options for consumers.

B. The Order Unreasonably Defers to the Market Development Working Group the Issue of Whether Shopping Customers Who Move to a New Address Must First Return to the SSO.

In its Work Plan, Staff recommended that the Commission offer "seamless moves" to CRES customers, such that customers' current CRES contract will follow them from their current to their new address without interruption. The Commission did not adopt the recommendation, but ordered Staff to develop an operational work plan within the context of the Market Development Working Group for the purpose of implementing a statewide seamless move, contract portability, instant connect or warm transfer process. Order, at 25. The Commission further noted that, "the operational plan should generally recognize the Commission's preference for shopping customers to maintain their status of shopping customers, and ***if they must return to the SSO provider after a change in address***, **then for as short a time as possible**." *Id.* (emphasis supplied).

Opt-out governmental aggregators must conduct their enrollment processes from the SSO. R.C. § 4928.20. Any preference given to CRES providers to enroll or renew enrollment of customers who establish new service in a community, in lieu of them having the opportunity to be enrolled in their community's aggregation program, would shrink a community's aggregation pool and adversely affect the community's ability to leverage its size into lower prices for its citizens. This proposal violates a community's legal right to aggregate its citizens under R. C. § 4928.20, as well as the Commission's obligation to promote and encourage large-scale governmental aggregation in this state. R. C. § 4928.20(K). As such, Ohio law requires customers establishing new service in a community first to be enrolled in the SSO. NOPEC urges the Commission to make this purely legal finding now on rehearing, rather than defer the issue for debate in the MDWG. Time may then be spent in the working group discussing the

amount of time the customer must remain on the SSO to permit governmental aggregators to conduct their opt-out enrollment process.

C. The Commission's Order is Unlawful inasmuch as it Fails to Require the EDU to Include Governmental Aggregators' Names or Logos on the EDU's Bill.

In its Order, the Commission required that if a customer is shopping, the CRES provider's name or logo must be displayed on the customer's bill next to the EDU's logo or in the area containing the supply charges. Order, at 30. The Commission did not require that if a customer was shopping through governmental aggregation, the governmental aggregator's name also should appear on the bill, even though Ohio's regulatory paradigm recognizes governmental aggregators as one of the three diverse groups of electric suppliers (R.C. § 4928.20), along with the EDU providing SSO service (R. C. § 4928.141) and CRES providers offering service through bi-lateral contracts (R. C. 4928.08).

NOPEC notes that, when customers shop through opt-out governmental aggregation, the customer relationship is between the customer and the governmental aggregator. The governmental aggregator forms the aggregation program, adopts its rules, enrolls its members, selects the supplier to serve the membership, and negotiates with the supplier the group's rates, terms and conditions of service. R.C. § 4928.20. The potential for competition between the governmental aggregator and CRES supplier are apparent, particularly when the term of an aggregation program ends. The governmental aggregator has an interest in securing the best price, terms and conditions of service for its members in the succeeding term of the aggregation program, which may not be provided by the existing supplier. In that event, the existing supplier to the group will have an interest in continuing to serve the program's customers through bilateral contracts, while the governmental aggregator has an interest to maintain its membership and the ability to leverage its aggregation size for lower prices. Thus, listing the CRES provider,

and not the governmental aggregator, on the EDU's bill gives the CRES provider an undue advantage in the competition to serve a community's residents. That undue advantage violates R.C. §§ 4928.02(A) (discriminating against governmental aggregators), 4928.02(C) (failing to ensure the diversity of electric supply and suppliers), and 4928.20(K) (failing to encourage and promote large-scale governmental aggregation in this state).

NOPEC respectfully requests the Commission to also require EDU's to include governmental aggregators' names or logos on its bills upon request when customers are shopping through a governmental aggregation program.

III. CONCLUSION

NOPEC respectfully requests that the Commission granting is request for rehearing as set forth above.

Respectfully submitted,

Glenn S. Krassen (Reg. No. 0007610)
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216)523-7071
E-mail: gkrassen@bricker.com

Dane Stinson (0019101)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone: (614) 227-4854
Facsimile: (614) 227-2390
Email: dstinson@bricker.com

Attorneys for Northeast Ohio Public Energy Council

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Northeast Ohio Public Energy Council's Application for Rehearing* was served upon the parties of record this 25th day of April 2014, *via* electronic transmission.

Dane Stinson

Dane Stinson

mhpetricoff@vorys.com	mkl@bbrslaw.com
smhoward@vorys.com	nmcdaniel@elpc.org
grady@occ.state.oh.us	haydenm@firstenergycorp.com
serio@occ.state.oh.us	jlang@calfee.com
fdarr@mwncmh.com	coneil@calfee.com
sam@mwncmh.com	lsacher@calfee.com
dboehm@BKLlawfirm.com	mswhite@igsenergy.com
mkurtz@BKLlawfirm.com	meissnerjoseph@yahoo.com
cmooney2@columbus.rr.com	wsundermeyer@aarp.org
drinebolt@ohiopartners.org,	ejacobs@ablelaw.org
msmalz@ohiopovertylaw.org	nmorgan@lascinti.org
jmaskovyak@ohiopovertylaw.org	toddm@wamenergylaw.com
william.wright@puc.state.oh.us	callwein@wamenergylaw.com
elizabeth.stevens@puc.state.oh.us	trent@theoec.org
burkj@firstenergycorp.com	cathy@theoec.org
judi.sobecki@dplinc.com	jaborell@co.lucas.oh.us
amy.spiller@duke-energy.com	trhayslaw@gmail.com
jeanne.kingery@duke-energy.com	gpoulos@enernoc.com
stephen.bennett@exeloncorp.com	barthroyer@aol.com
cynthia.brady@constellation.com	gary.a.jeffries@dom.com
david.fein@constellation.com	carlwood@uwua.net
stnourse@aep.com	markbrooks@uwua.net
mjsatterwhite@aep.com	cgoodman@energymarketers.com
yalami@aep.com	srantala@energymarketers.com
tsiwo@bricker.com	jtough@chooseenergy.com
marmstrong@bricker.com	

Agenda
Tuesday, July 30, 2013

10:00 a.m. – Prepared Discussion Remarks

Panelist

- **Stacia Harper –Ohio Partners for Affordable Energy**
- **Joe Serio – Ohio Consumer's Council**
- **Sharon Noewer – First Energy Solutions**
- **Bill Allen – American Electric Power**
- **Teresa Ringenbach – Direct Energy**

10:20 a.m. – Barriers to Competitive Retail Market, Do They Exist

a. Does default service provide an advantage to the incumbent provider and/or its generation affiliate(s)?
b. Are there market design changes that should be implemented to eliminate any status quo bias benefit for default service?
c. What potential barriers, if any, are being created by the implementation of a provider's smart meter plans? Should CRES suppliers be permitted to deploy smart meters to customer?
d. Do third party providers of energy efficiency, renewable, demand response or alternative energy products have adequate market access?
e. If predatory pricing or other market factors become a barrier to a fully functional competitive retail electric service market, can and should the Commission regulate predatory pricing or other market factors? How would the Commission determine if predatory pricing is taking place?
f. Are competitive retail electric service providers better positioned to manage uncertainty in a retail market than EDUs that offer a flat SSO rate?

12:00 p.m. – Lunch

1:00 p.m. – Resume Open Discussion

2:30 p.m. – Determine Sub-Committee

3:00 p.m. – Conclude

Summary: Application for Rehearing of Northeast Ohio Public Energy Council electronically filed by Teresa Orahood on behalf of Glenn S. Krassen