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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)
the Northeast Ohio Public Energy Council) Case No. 09-903-EL-UNC
and Gexa Energy Ohio, LLC for Waivers)
or, in the Alternative, that Waivers are)
Unnecessary.)

**MOTION TO INTERVENE AND COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene in this case in which the Northeast Ohio Public Energy Council ("NOPEC") and Gexa Energy Ohio LLC ("Gexa," and collectively with NOPEC, "Applicants") jointly ask for limited waivers to Ohio Adm. Code 4901:1-10-01(P) and Ohio Adm. Code 4901:1-21-01(T), or for a determination that such waivers are unnecessary.¹ NOPEC, a regional council of governments involved in governmental aggregation in areas served by the Ohio Edison Company and The Cleveland Electric Illuminating Company (collectively, "FirstEnergy"), submitted its waiver requests due to uncertainty concerning the consumer protection rules contained in Sections 4901:1-10 and 4901:1-21 (i.e. "Rule 10" and "Rule 21") of the Ohio Administrative Code.² The OCC files on behalf of residential utility consumers.

¹ See R.C. Chapter 4911, R.C. 4903.221, and Ohio Adm. Code 4901:1-11.

² Joint Application at 4-5 (October 2, 2009).

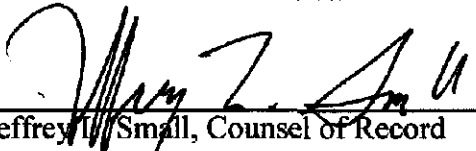
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The OCC supports the Joint Application and encourages its prompt approval based upon representations of the Applicants regarding its intended interpretation.³

The reasons the Public Utilities Commission of Ohio ("PUCO" or "Commission") should grant the OCC's Motion to Intervene ("Motion"), and further consider the OCC's Comments, are set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
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³ The Applicants (i) have confirmed to the OCC that the limited waiver will not affect compliance with the consumer safeguards and other substantive provisions contained in Rule 10 and Rule 21 and (ii) have agreed to provide customers the opportunity to opt-out of the aggregation program prior to the five-month period related to the limited waiver. Joint Application at 5, ¶14. Moreover, the Applicants state that market conditions are favorable for Applicants to secure additional savings for NOPEC customers' electric supply for the five-month period in question. Joint Application at 1.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The above-referenced docket was initiated regarding the Joint Application that addresses Rules 10 and 21 as they apply to aggregation programs. The unusual aspect of the waiver request is that the portion of Rules 10 and 21 that Applicants address are definitions, not substantive consumer protection requirements in the Commission's rules. The OCC addresses these consumer protection requirements regarding the interests of residential utility customers who may be involved in aggregation programs administered by Applicants.

II. ARGUMENT

A. Intervention

R.C. 4903.221 provides, in part, that any person "who may be adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio's residential consumers may be "adversely affected" in this case where service to residential customers and consumer protections are at issue. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest lies in representing all residential consumers of FirstEnergy in order to help ensure that governmental aggregation is encouraged as envisioned in S.B. 221⁴ while maintaining important consumer protections for customer of aggregation programs. Governmental aggregation provides the benefits to customers from any reduced price for generation service offered in the aggregation programs, and must be conducted such that customers receive the consumer protections provided in Rule 10 and 21 regarding their choice of generation service providers.

The Joint Application filed by NOPEC and Gexa seeks a waiver in connection with the definition of "governmental aggregation program" that is located in both Rule 10 and 21 (or, in the alternative, a determination that a waiver is unnecessary). That term is used in consumer protection provisions that are contained in Rule 10 and Rule 21, and these consumer protections should not erode with the passage of time as the

⁴ See, e.g., R.C. 4928.20(K).

result of various applications for waivers. The OCC does not believe that NOPEC and Gexa intend such erosion, and the OCC contacted these parties to gain a better understanding of the aggregation operations proposed upon approval of the Joint Application.⁵ As stated in the following comments, the OCC supports approval of the Joint Application considering, *inter alia*, that Applicants have confirmed to the OCC that the limited waiver is not intended to affect compliance with the consumer safeguards contained in Rule 10 and Rule 21.

The interests stated directly above are different than that of any other party, including that of governmental aggregators and different than that of the utility whose advocacy includes the financial interest of stockholders.

Second, the OCC's advocacy for consumers will include advancing the position that adequate consumer protections must be maintained in offerings by governmental aggregators. Consumer protections should be administered, however, with the objective of serving customers and not with a view towards obstructing potentially valuable service offerings. The OCC's position is therefore directly related to the merits of the matters recently raised in this docket that are pending before the PUCO, the authority with regulatory control over the terms for providing aggregation service in Ohio.

Third, the OCC's intervention will not unduly prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest. The

⁵ A recent joint filing by NOPEC and Gexa Ohio recognizes the interests of the OCC in its consumer advocacy role regarding the protection of residential customers. *In re First Set of NOPEC Waiver Requests*, Case No. 00-2317-EL-GAG, Memorandum Contra FirstEnergy Solution's Motion to Intervene at 3 (June 29, 2009).

OCC hopes that the position of Ohio's statutory representative of residential customers will speed approval of the Joint Application subject to the clarifications stated herein.

Fourth, the OCC's intervention will significantly contribute to the full development and equitable resolution of the case. The OCC has been significantly involved in the major discussions revolving around aggregation service that began with passage of electric restructuring legislation in 1999 and continued concerning enactment of S.B. 221 in 2008. This involvement includes all cases that contributed to development of the Ohio Administrative Rules that are at issue in this case. From this experience, the OCC has information that the PUCO should consider for equitably and lawfully deciding matters raised in this docket in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a very real and substantial interest in this case involving governmental aggregation programs and the protection of customers.

In addition, the OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that the OCC has already addressed and that the OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While the OCC does not concede the lawfulness of this criterion, the OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio's

residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed the OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying the OCC's intervention and that OCC should have been granted intervention.⁶

The OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of Ohio residential consumers, the Commission should grant OCC's Motion to Intervene.

B. Comments: The Joint Application Should be Approved with Clarification.

The Joint Application seeks to assure that the Commission will not find fault with a five-month offer of generation service for the period from January 1, 2011 to May 31, 2011, which is the end of the approved period for FirstEnergy's standard service offer. The Applicants are concerned about the application of the definition portions of Rule 10 and Rule 21 under this circumstance.⁷ The definition at issue in each rule states:

“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.⁸

⁶ See *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20 (2006).

⁷ Joint Application at 4.

⁸ Ohio Adm. Code 4901:1-10-01(P) and Ohio Adm. Code 4901:1-21-01(T), quoted by Joint Application at 3, ¶18.

The rules do not explicitly state that offers of generation service by aggregators are prohibited if they are “less than one year,” but the Joint Application addresses the implied limitation contained in the above-quoted definitions.

The requested waiver is unusual, not only because it seeks waiver to definitions and not substantive requirements but also because Applicants seek to have the substantive portions of Rule 10 and Rule 21 *apply to their circumstances* rather than seek exemption from such rules. Upon approval of the Joint Application, Applicants would conduct their operations -- including their interactions with FirstEnergy -- as if their five-month offer falls within the Commission’s definition of “governmental aggregation program” for purposes of applying Rule 10 and Rule 21.

As an example of the intent of the Joint Application from Rule 10, account information would be provided by FirstEnergy to NOPEC as stated in Ohio Adm. Code 4901:1-10-24(E)(1)(c) (“cooperation with governmental aggregation programs”). As an example from Rule 21, NOPEC would disclose to customers the dates for its new generation service offer prior to including a customer’s account in an aggregation as provided for in Ohio Adm. Code 4901:1-21-17(A)(5). Also, the treatment of customers under the “do not aggregate” provisions in Ohio Adm. Code 4901:1-21-17(E)(3) would be unaltered by approval of the Joint Application. As stated earlier, the OCC contacted both Applicants and has confirmed that the Joint Application intends this application of the rules regarding governmental aggregation.

Considering that Applicants have confirmed to the OCC that the limited waiver will not affect their compliance with the consumer safeguards contained in Rule 10 and

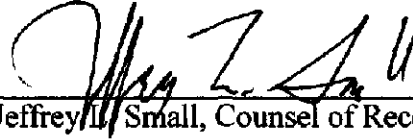
Rule 21, and that Applicants have agreed to provide consumers the opportunity to opt-out of the aggregation program prior to the five-month period related to the limited waiver, the OCC believes that consumer protections will be preserved if the Joint Application is approved. Given these assurances, and because market conditions are apparently favorable for Applicants to secure additional savings for NOPEC customers for the five-month period in question, the OCC encourages the Commission to promptly approve the Joint Application. For clarity, the Commission's order should clearly state that the substantive consumer protections contained in Rules 10 and 21 will continue to apply.

III. CONCLUSION

For the above-stated reasons, the Commission should grant the OCC's Motion to Intervene. Also, the OCC supports the prompt approval of the waivers sought by Applicants. The order granting the waivers should clearly state, however, that Applicants' proposed five-month offer will be subject to the substantive rules applicable to a "governmental aggregation program" as that term is used in Rules 10 and 21.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Intervene and Comments* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 20th day of October 2009.


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