

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of Application of Suvon, LLC, |) | |
| d/b/a FirstEnergy Advisors for Certification |) | Case No. 20-0103-EL-AGG |
| as an Aggregator and Power Broker |) | |

**VISTRA ENERGY CORP.’S MEMORANDUM CONTRA SUVON, LLC’S MOTION
FOR PROTECTIVE ORDER**

I. INTRODUCTION

Vistra Energy Corp. (“Vistra” or “Company”) submits this Memorandum Contra Suvon, LLC d/b/a FirstEnergy Advisors’ (“FirstEnergy Advisors”) Motion for Protective Order and Memorandum in Support (collectively “Motion for Protective Order”) filed on March 17, 2020. FirstEnergy Advisors seeks a protective order not only from the discovery requests Northeast Ohio Public Energy Council (“NOPEC”) submitted, but from “any discovery which may be issued in the future by intervenors” on the grounds that such discovery is premature and would cause an undue burden.¹

Contrary to FirstEnergy Advisors’ Motion for Protective Order, the Commission has consistently approved discovery prior to a hearing being scheduled and has approved discovery in Competitive Retail Electric Service Provider (“CRES”) matters. Further, FirstEnergy Advisors does not show that it will experience an undue burden responding to discovery requests from NOPEC or other parties, and asks the Commission to ignore the basic procedural requirements to request a protective order. For these reasons, Vistra requests that the Commission deny FirstEnergy

¹ Motion for Protective Order, at 1. Vistra has drafted, and is ready to serve, discovery on FirstEnergy Advisors related to this case. Vistra has not yet served this discovery pending the Public Utilities Commission of Ohio’s (“Commission’s”) decision on FirstEnergy Advisors’ Motion for Protective Order.

Advisors' Motion for Protective Order.² Vistra continues to request that the Commission grant its uncontested Motion to Intervene in this case.

II. ARGUMENT

A. Discovery is not premature at this time.

FirstEnergy Advisors requests a protective order from the Commission on the grounds that discovery is premature.³ The Commission however, consistently allows for discovery under similar circumstances and the authorities FirstEnergy Advisors relies on are either irrelevant to the issue or support discovery at this time.

1. The Commission consistently authorizes discovery under comparable circumstances, recognizing that parties and intervenors are entitled to discovery immediately after a proceeding begins.

FirstEnergy Advisors' argument is not new. When the Commission evaluates whether discovery should be granted before a hearing is scheduled, it regularly approves discovery based on Ohio Rev. Code § 4903.082 and Ohio Admin. Code 4901-1-17(A). Ohio Rev. Code § 4903.082 states in relevant part that: "All parties and intervenors shall be granted *ample rights of discovery*." (emphasis added). Ohio Admin. Code 4901-1-17(A) states:

(A) Except as provided in paragraph (E) of this rule, discovery may begin *immediately after a proceeding is commenced and should be completed as expeditiously as possible*. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.

(emphasis added). When Columbia Gas of Ohio filed a motion to stay discovery on the grounds that a hearing had not been ordered, the Commission quickly rejected this argument.⁴ There, the Commission explained:

² Vistra reserves the right to file a Motion to Compel in accordance with Ohio Admin. Code 4901-1-23 in the event that FirstEnergy Advisors fails to reply to future discovery requests from Vistra.

³ Motion for Protective Order, at 4.

⁴ *In re the Matter of Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 11-5351-GA-UNC, Entry, at ¶¶ 6, 8 (Jan. 27, 2012).

Section 4903.082, Revised Code, requires the Commission to ensure ample rights of discovery, while Rule 4901-1-17(A), O.A.C., generally provides that discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible.⁵

When Dayton Power and Light argued that a proceeding must be set for a hearing before discovery could be granted the Commission again disagreed, stating:

[T]he attorney examiner finds *no merit* to DP&L's assertion that this matter must be set for hearing before proper discovery is conducted Additionally, we have previously denied a motion to stay discovery on these grounds, where no hearing was set, so that parties could prepare their comments and reply comments to better inform the Commission.⁶

(emphasis added).

Finally, the Commission also approves discovery in CRES matters. For example, earlier this month, the Commission ordered discovery in Verde Energy's CRES renewal application case.⁷ As in these comparable proceedings, Vistra requests that the Commission approve discovery here.

2. FirstEnergy Advisors' citations support discovery or are irrelevant.

FirstEnergy Advisors contends that because the Commission has not scheduled a hearing, and "[t]here is no universal right to discovery in every Commission case," the Commission should prevent discovery.⁸ FirstEnergy Advisors cites to Ohio Admin. Code 4901-1-17(A) and 4901-1-16(A) to assert that these rules contemplate limiting discovery to those instances where there is a Commission-ordered proceeding or hearing.⁹ As discussed in greater detail below, the

⁵ *Id.* at ¶ 8.

⁶ *In the Matter of the Application of Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Case No. 13-2420-EL-UNC, Entry, at ¶ 9 (May 30, 2014) (citing *Columbia Gas of Ohio*). *See also, In the Matter of the Complaint of Cleveland Electric Illuminating Company, American Transmission Systems, Inc. and the East Ohio Gas Company*, Case No. 07-385-EL-PWC, Entry, at ¶ 9 (Apr. 17, 2007) ("Although the Commission must still determine if reasonable grounds for complaint have been stated, the parties are reminded that, pursuant to Rule 4901-1-17, O.A.C., discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible.").

⁷ *In the Matter of The Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Supplier*, Case No. 11-5886-EL-CRS, Entry, at ¶ 13 (March 3, 2020).

⁸ Motion for Protective Order, at 1.

⁹ Motion for Protective Order, at 5.

Commission has preserved its discretion to determine what constitutes a proceeding, so neither Ohio Admin. Code 4901-1-17(A) nor Ohio Admin. Code 4901-1-16(A) preclude this matter.¹⁰ Additionally, in *Columbia Gas of Ohio* and *Cleveland Electric Illuminating Company*, the Commission specifically relied on Ohio Admin. Code 4901-1-17(A) to conclude that a hearing need not be scheduled for discovery to occur.¹¹

Ohio Admin. Code 4901-1-16(A) merely states in relevant part that the “purpose of rules 4901-1-16 to 4901-1-24 . . . is to encourage the *prompt and expeditious* use of prehearing discovery.” (emphasis added). No component of this section requires a hearing to be scheduled for discovery to occur. Instead, FirstEnergy Advisors’ delay tactics with its Motion for Protective Order run counter to this section’s goal of a prompt and expeditious discovery process.

The decisions FirstEnergy Advisors relies on to support its position either do not address the issue at hand or are not representative of the Commission’s perspective on discovery. FirstEnergy Advisors first cites to a rulemaking where the Commission retained its discretion to determine when discovery is appropriate in a given matter.¹² In *In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, the Commission merely declined to adopt an OCC definition of “proceeding” that would have allowed for broad participation in all Commission proceedings.¹³ No party is claiming that the Commission must allow for discovery under all circumstances. The issue is whether discovery should occur under the circumstances in this case.

¹⁰ *In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order, at ¶ 9 (Dec. 6, 2006).

¹¹ *In re the Matter of Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 11-5351-GA-UNC, Entry, at ¶¶ 6, 8 (Jan. 27, 2012); *In the Matter of the Complaint of Cleveland Electric Illuminating Company, American Transmission Systems, Inc. and the East Ohio Gas Company*, Case No. 07-385-EL-PWC, Entry, at ¶ 9 (Apr. 17, 2007).

¹² Motion for Protective Order, at 5.

¹³ *In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order, at ¶ 9 (Dec. 6, 2006).

FirstEnergy Advisors next cites to a telecommunications unbundling case¹⁴ where the Commission noted that the proceeding was “highly unique and complex,” and thus exercised its discretion to limit discovery during part of the proceeding.¹⁵ Even there, the Commission retained the possibility of discovery, stating that “the Commission has not foreclosed the possibility of party-initiated discovery”¹⁶ As the Commission noted in that case, the circumstances were unique and not representative of the Commission’s perspective on discovery.

B. FirstEnergy Advisors has not shown it will suffer an undue burden by lack of a defined proceeding scope.

Ohio Admin. Code 4901-1-24(A) contains the Commission’s legal standard for protective orders, stating in relevant part:

(A) Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

(1) Discovery not be had.

Without citing any of the other reasons for granting a protective order under Ohio Admin. Code 4901-1-24(A), FirstEnergy Advisors asserts that the protective order should be granted with respect to discovery by NOPEC and any served in the future by interveners¹⁷ because “discovery would impose an undue burden.”¹⁸ To support this claim, FirstEnergy Advisors alleges that there is no way of knowing which discovery requests could lead to admissible evidence “without knowing the scope of the case.”¹⁹ FirstEnergy Advisors then helpfully invalidates its own

¹⁴ Motion for Protective Order, at 6.

¹⁵ *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing, at ¶ 8 (Oct. 28, 2003).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Motion for Protective Order, at 4.

¹⁹ *Id.*

argument by confirming that “the proper scope of this matter is contained in Ohio Admin. Code 4901:1-24-10...”²⁰ Ohio Admin. Code 4901:1-24-10(C) states that approval or denial of a CRES application turns on whether:

- (1) The applicant is managerially, financially, and technically fit and capable of performing the service it intends to provide.
- (2) The applicant is managerially, financially, and technically fit and capable of complying with all applicable commission rules and orders.
- (3) The applicant is able to provide reasonable financial assurances sufficient to protect electric distribution utility companies and the customers from default.

FirstEnergy Advisors is aware of the scope it identified and will suffer no undue burden applying this scope to the discovery requests it receives. Because FirstEnergy Advisors articulated no other justification for a protective order recognized by Ohio Admin. Code 4901-1-24(A), the Commission should deny the Motion for Protective Order on these grounds alone.

C. FirstEnergy Advisors’ Motion cannot comply with the basic procedural requirements for motions for protective orders.

Ohio Admin. Code 4901-1-24(B) outlines the procedural requirements for motions for protective orders and states in relevant part that “[n]o motion for a protective order shall be filed...until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery.”²¹ Further, Ohio Admin. Code 4901-1-24(B) and the Commission’s discovery rules “are intended to minimize commission intervention in the discovery process.”²²

²⁰ Motion for Protective Order, at 6.

²¹ As Ohio Admin. Code 4901-1-16(H) states, the term “party” includes any person who has filed a motion to intervene, which is pending at the time a discovery request or motion is to be served or filed.

²² Ohio Admin. Code 4901-1-16(A).

FirstEnergy Advisors acknowledges that it must comply with the procedural requirements in Ohio Admin. Code 4901-1-24(B) with respect to NOPEC.²³ FirstEnergy Advisors also provided an affidavit describing its efforts to resolve its differences with NOPEC.²⁴

On the first page of its Motion for Protective Order, FirstEnergy Advisors asks the Commission to apply a blanket protective order to “any discovery which may be issued in the future by intervenors,” without any explanation of how this request could possibly meet the requirements in Ohio Admin. Code 4901-1-24(B).²⁵ FirstEnergy Advisors has not demonstrated its fulfillment of these requirements. Granting FirstEnergy Advisors’ Motion for Protective Order will allow it to avoid resolution of any future discovery requests from Vistra and other intervenors, in direct contravention of Ohio Admin. Code 4901-1-24(B). Further, doing so would result in the Commission involving itself in the discovery process at this stage, going against its stated intent to minimize its involvement in this process. Because the Motion for Protective Order does not comply with Ohio Admin. Code 4901-1-24(B) and goes against the Commission’s intent for the discovery process, the Commission should deny FirstEnergy Advisors’ Motion.

III. CONCLUSION

For the foregoing reasons, Vistra respectfully requests that the Commission deny FirstEnergy Advisors’ Motion for Protective Order. Vistra reiterates its request to intervene in accordance with its uncontested Motion to Intervene and Memorandum in Support filed on February 11, 2020.

²³ Motion for Protective Order, at 1.

²⁴ Motion for Protective Order, at 1 (describing the affidavit).

²⁵ Motion for Protective Order, at 1.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 1st of April 2020. The Commission's e-filing system will serve notice of the filing of this document on the parties who have electronically subscribed to this case. In addition, I hereby certify that a copy of the foregoing was sent via overnight U.S. mail to the following person on April 1, 2020.



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Summary: Memorandum Vistra Energy Corp.'s Memorandum Contra Suvon, LLC's Motion for Protective Order electronically filed by Ina Avalon on behalf of Vistra Energy Corp.