

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Initial Certification )  
Application of Suvon, LLC d/b/a FirstEnergy )  
Advisors to Provide Aggregation and Broker ) Case No. 20-103-EL-AGG  
Services in the State of Ohio. )

---

**NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S  
MEMORANDUM CONTRA  
FIRSTENERGY ADVISORS' MOTION FOR PROTECTIVE ORDER**

---

**I. INTRODUCTION**

FirstEnergy Advisors<sup>1</sup> is so intent on hiding its relationships with FirstEnergy Corp's Ohio electric distribution utilities ("EDUs")<sup>2</sup> that it asks the PUCO to order a blanket ban on all discovery in this proceeding. What is FirstEnergy Advisors hiding? FirstEnergy Advisors already has refused to provide any answers whatsoever to NOPEC's<sup>3</sup> First Set of Discovery and Request for Production of Documents served February 20, 2020 ("First Set"). FirstEnergy Advisors' objections to the First Set were so factually and legally specious that NOPEC was forced to ask the PUCO to compel FirstEnergy Advisors to respond fully and comply with the PUCO's rules and established precedent.<sup>4</sup> Although it apparently thinks otherwise, FirstEnergy Advisors does not decide intervenors' discovery rights,<sup>5</sup> the PUCO's rules and precedent do.

---

<sup>1</sup> The applicant, Suvon, LLC, proposes to do business in Ohio as FirstEnergy Advisors.

<sup>2</sup> The Ohio EDUs are The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company.

<sup>3</sup> NOPEC is the Northeastern Ohio Public Utilities Council, which serves over 500,000 residential and commercial retail electric customers in Ohio.

<sup>4</sup> See NOPEC's Motion to Compel, filed March 20, 2020. The motion is incorporated by reference in this memorandum contra.

<sup>5</sup> See FirstEnergy Advisors' Motion for Protective Order at 4 (asserting that discovery cannot begin until FirstEnergy Advisors or the PUCO agree on the issues that are relevant to this case).

Although FirstEnergy names NOPEC as the object of its motion for protective order, the motion also is aimed at the many other intervenors in this proceeding, including the Office of the Ohio Consumers' Counsel ("OCC"). OCC served its first set of interrogatories and request for production of documents on FirstEnergy Advisors on March 9, 2020. FirstEnergy Advisors seeks to prevent OCC and all other intervenors from even requesting information, in an attempt to scuttle their preparation for hearing in this proceeding. Each of these intervenors has a legitimate right to discovery to protect their interests against abuses in market power in Ohio's competitive markets.<sup>6</sup> Each also has the right to protect consumers' interests in obtaining reasonably priced electric service from the suppliers of their choice.<sup>7</sup> Indeed, FirstEnergy Advisors' certification application is opposed by nearly all of the consumer and competitive retail electric service ("CRES") provider interests in Ohio. The intervenors include: NOPEC, OCC, Retail Energy Supply Association, Interstate Gas Supply, Palmer Energy Company, Vistra Energy Corp. and its subsidiaries,<sup>8</sup> the Northwest Ohio Aggregation Coalition, and Energy Professionals of Ohio.

To protect Ohio's consumers and the competitive retail electric market, the intervenors have the right to know the full extent of the relationships between the EDUs' management and that of their affiliates, including FirstEnergy Advisors. Knowledge of these inter-relationships is necessary and critical to prevent the abuses of market power and violations of Ohio law that may

---

<sup>6</sup> See R.C. 4928.01(H) and (I).

<sup>7</sup> See R.C. 4928.01(A)-(C).

<sup>8</sup> Vistra's competitive retail electric service providers in Ohio include Dynegy Energy Services (East), LLC (d/b/a Dynegy; d/b/a Brighten Energy; d/b/a Better Buy Energy; d/b/a True Fit Energy; d/b/a Honor Energy); Ambit Northeast, LLC; Cincinnati Bell Energy, LLC; Energy Services Providers, Inc. d/b/a Ohio Gas & Electric; Everyday Energy, LLC d/b/a Value Power & Gas; Public Power, LLC; TriEagle Energy LP; and Viridian Energy PA LLC.

arise if the EDUs do not operate as fully separated affiliates.<sup>9</sup> FirstEnergy Advisors should not be permitted to hide this information and conceal the potential for abuse and illegal activities.

For these and the following reasons, FirstEnergy Advisors' motion for protective order should be denied, and its true relationships with the Ohio EDUs revealed.

## **II. SCOPE OF STATUTORY RIGHT TO DISCOVERY**

FirstEnergy Advisors asks the PUCO to bar all discovery in this proceeding unless the PUCO orders a hearing. However, R.C. 4903.082 provides in part:

All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties.

In implementing this statute, the PUCO's rules (O.A.C. 4901-1-16(H)) provide:

For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, 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.

NOPEC's motion to intervene was filed February 10, 2020. FirstEnergy Advisors' application was suspended from automatic approval the next day, February 11, 2020. First Energy Advisors did not oppose NOPEC's motion to intervene. NOPEC's motion to intervene remains pending and provides NOPEC the right to timely and complete discovery responses from FirstEnergy Advisors. O.A.C. 4901-1-19; 4901-1-20. Under the PUCO's rules, "discovery may begin immediately after a proceeding is commenced."<sup>10</sup>

The PUCO has adopted rules that specifically define the scope of discovery. O.A.C. 4901-1-16(B) provides:

---

<sup>9</sup> See R.C. 4928.17 and O.A.C. Chapter 4901:1-37.

<sup>10</sup> O.A.C. Rule 4901-1-17(A). Accord Ohio Civ. R. 33(A) (interrogatories may be served by any party without leave on the plaintiff "after commencement of the action.").

\*\*\*any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

The PUCO's rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Ohio Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.<sup>11</sup>

This scope of discovery is applicable to written interrogatories. Written interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the discovery is served, under O.A.C. 4901-1-19.

NOPEC's and OCC's right to discovery is assured by law, rule, and Supreme Court precedent.<sup>12</sup> Each is entitled to timely and complete responses to its discovery inquiries.

### III. ARGUMENT

- A. If the customary and benign discovery requested of FirstEnergy Advisors creates an undue burden or expense, FirstEnergy Advisors' application should be denied forthwith for lacking the managerial, technical, and financial capability to provide service. O.A.C. 4901:1-24-10(C)(1). The application also should be denied for FirstEnergy Advisors' lack of fitness to follow the PUCO's discovery rules and established precedent. O.A.C. 4901:1-24-10(C)(2).**

FirstEnergy makes the outrageous claim that providing full responses to each of NOPEC's interrogatories constitutes an "undue burden and expense," citing O.A.C. 4901-1-24(A). However, FirstEnergy provides absolutely no information to support its claims, and for good reason—they cannot be supported. Just how burdensome and expensive is it for

---

<sup>11</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, ¶83, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St. 3d 1479.

<sup>12</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

FirstEnergy Advisors to (1) forward to NOPEC its responses to Staff's data requests,<sup>13</sup> (2) identify FirstEnergy Advisors' own employees,<sup>14</sup> (3) identify its own members,<sup>15</sup> (4) identify its corporate formation documents,<sup>16</sup> (5) identify the positions held by its officers and managers in FirstEnergy Corp and its subsidiaries,<sup>17</sup> and (6) clarify the statements made in its own application, Exhibits B-2 and B-3?<sup>18</sup> If providing this available and benign information to NOPEC is unduly burdensome, then the PUCO should find that FirstEnergy Advisors doesn't have the managerial or technical ability to provide service.<sup>19</sup> R.C. 4928.08(C)(1). If providing the information is too expensive, the PUCO should find that FirstEnergy Advisors does not have the financial capability to provide service. *Id.* Indeed, FirstEnergy's failure to follow the PUCO's discovery rules and established precedent shows that FirstEnergy Advisors is not fit to provide service and its application should be denied for that reason alone.

FirstEnergy Advisors' arguments show the extent to which it is willing to engage in gamesmanship with the PUCO's rules. It easily could provide the information requested, and at a limited expense. It is using any excuse to conceal its relationship with its affiliated EDUs from Ohio's consumers. FirstEnergy's real argument is that discovery cannot commence until the PUCO sets a hearing in this matter. This argument is equally untenable.

---

<sup>13</sup> See FirstEnergy Advisors' Motion for Protective Order, Exhibit A, NOPEC INT-01.

<sup>14</sup> *Id.*, NOPEC INT-02,

<sup>15</sup> *Id.*, NOPEC INT-04.

<sup>16</sup> *Id.*, NOPEC INT-05.

<sup>17</sup> *Id.*, NOPEC INT-10 through INT-17.

<sup>18</sup> *Id.*, NOPEC INT-18 and 19.

<sup>19</sup> To the extent that FirstEnergy Advisors believes it is a burden to identify persons and documents that may lead to the discovery of relevant evidence, NOPEC reminds it of the Ohio Supreme Court's decision in *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479, 664 N.E.2d 532 ("Pursuant to Civ.R. 26(B)(1), a party may obtain discovery regarding non-privileged information relevant to the claim or defense of a proceeding. This includes determining the existence of documents and the identity of persons having knowledge of any discoverable matter").

**B. The PUCO's rules and established precedent permit discovery before a proceeding is set for hearing.**

FirstEnergy Advisors contorts Ohio law and the PUCO's precedent by claiming that the PUCO has "adopted" a "procedure" to permit discovery only when a hearing has been scheduled in a proceeding.<sup>20</sup> This simply is not true. The PUCO has not "adopted" any such "procedure." The PUCO repeatedly has found that discovery can be held prior to its determination whether to hold a hearing.

In fact, the PUCO recently found that an intervenor can commence discovery against a certification applicant as soon as the intervenor files a motion to intervene.<sup>21</sup> Similar to FirstEnergy Advisors' arguments, Verde asserted that efficiency required that discovery not commence until after intervention is granted and a procedural schedule established.<sup>22</sup> The PUCO rejected Verde's argument and found that an intervenor can commence discovery prior to the PUCO setting a procedural schedule or hearing. The PUCO stated:

...under Ohio Adm. Code 4901-1-16(H), 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. *Therefore, unless and until the attorney examiner rules on any pending motion to intervene, all parties, including the Company, are subject to discovery for the purposes of these proceedings, and should timely respond to all discovery requests.* [Id. at ¶ 13 (emphasis supplied).]

Also on point is *In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC, in which Columbia Gas filed an application not for an increase in rates, pursuant to R.C. 4909.18. Scheduling a hearing in such matters is discretionary. However, the PUCO found that intervenors could seek discovery prior to the PUCO's determination whether to hold a hearing, stating:

---

<sup>20</sup> See FirstEnergy Advisors' Motion for Protective Order at 3.

<sup>21</sup> *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Services Supplier, et. al*, Case Nos. 11-5886-EL-CRS and 13-2164-GA-CRS, Entry (March 3, 2020) ("Verde").

<sup>22</sup> *Id.*, Verde's memorandum contra OCC's motion to compel (January 10, 2020).

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.

*Id.*, Entry (January 27, 2012) at 2. See, also, *In re Cleveland Elec. Illum. Co. et al.*, Case No. 07-385-EL-PWC, Entry (April 17, 2007) at 2 (“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.”); accord *In re Cincinnati Gas & Elec. Co. v. City of Lebanon*, Case No. 05-103-EL-PWC, Entry (February 8, 2005) at 2.

In its attempt to deny intervenors their due discovery rights, FirstEnergy Advisors cites two cases, neither of which is on point. First, the PUCO denied an OCC proposal in a rulemaking case<sup>23</sup> that, if adopted, would permit “any interested person [to] have the right to intervene, conduct discovery, and present evidence in any Commission case.” OCC’s request was much broader than the discovery rights at issue here and would have permitted universal participation in all PUCO proceedings. In this case, NOPEC’s intervention is unopposed, the issues are identified, and NOPEC and OCC will participate in a hearing if they are formally granted intervention. In accordance with the PUCO precedent cited above (which was decided after FirstEnergy Advisor’s cited rulemaking), NOPEC seeks only what it is entitled to now: to commence discovery to prepare for hearing.

Second, FirstEnergy Advisors relies on a case in which the Federal Communications Commission delegated to the PUCO the daunting task of determining the “unbundling”

---

<sup>23</sup> See *In re Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006) at paragraph 9.

obligations of all of Ohio's incumbent local exchange companies.<sup>24</sup> Noting that the case was a "highly unique and complex proceeding,"<sup>25</sup> the PUCO initially managed discovery by having all parties respond in writing to questions the PUCO had posed. The PUCO left open the potential for the parties to conduct their own discovery and guaranteed the right to depose witnesses before filing testimony.<sup>26</sup> *Triennial Review* has little precedential value noting its "highly unique" nature and that it conflicts with the established PUCO precedent in cases *decided thereafter* that permit intervenor discovery before hearing is set. The PUCO's overwhelming precedent should be followed in the instant certification case in which the issues are identified. If anything, the *Triennial Review*'s managed discovery process stands for the proposition that FirstEnergy Advisors should share its responses to PUCO data requests for the benefit of all intervenors. See FirstEnergy Advisors' Motion for Protective Order Exhibit A, NOPEC INT-01. FirstEnergy Advisors even refuses this standard courtesy that is routinely practiced in PUCO proceedings.

The PUCO should deny FirstEnergy's request for a blanket ban on discovery. If FirstEnergy Advisors believes a particular interrogatory creates an undue burden or expense, it is entitled to challenge the individual request, as is the practice in all other PUCO proceedings. FirstEnergy Advisors already has lodged objections regarding NOPEC's First Set. A blanket ban is unnecessary under PUCO practice, would prevent all intervenors from preparing for hearing, and would be fundamentally unfair to the EDU's customers and the Ohio retail electric market.

---

<sup>24</sup> *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing (October 28, 2003) ("*Triennial Review*").

<sup>25</sup> *Id.*, paragraph 8.

<sup>26</sup> *Id.*



**C. The scope of this proceeding already has been defined by R.C. 4928.08(B) and O.A.C. 4901:1-24-10(C).**

In arguably the purest display of regulatory hubris, FirstEnergy Advisors claims that discovery cannot begin until FirstEnergy Advisors or the PUCO agree on the issues that are relevant to this case.<sup>27</sup> It asserts that O.A.C. 4901:1-24-10(B) controls the scope of this proceeding and does not contemplate input from intervenors.<sup>28</sup> FirstEnergy Advisors' argument is nonsense. The cited rule provides that the PUCO will make its decision based upon "evidence," which would include the evidence that FirstEnergy Advisors produces in response to NOPEC's, OCC's and other intervenors' discovery. FirstEnergy Advisors ignores the PUCO's ability to conduct a hearing in this matter and the intervenors' right to prepare for it. O.A.C. 4901:1-24-10(A)(2)(c).

Next, FirstEnergy Advisors claims that the only issue in this proceeding is whether it meets the criteria to serve as an aggregator and broker, *i.e.*, whether it has the managerial and technical ability to provide service and is fit to follow the PUCO's rules and orders. O.A.C. 4901:1-24-10(C)(1) and (2). NOPEC agrees. FirstEnergy Advisors just refuses to admit that the discovery they seek will lead to the conclusion that FirstEnergy Advisors does not meet the criteria.

*Verde* disposes of FirstEnergy Advisors' arguments. In *Verde*, the application also was suspended "to allow the Commission and Staff additional time to review the application." *Verde* at ¶ 9. Contrary to FirstEnergy Advisors' position, this language is not meant to exclude intervenors from participating in discovery. In *Verde*, no issues were defined beyond the standards of R.C. 4928.08 and O.A.C. 4901:1-21-20(C), intervention motions remained pending, and the PUCO had not determined

---

<sup>27</sup> FirstEnergy Advisors' Motion for Protective Order at 4.

<sup>28</sup> *Id.*

whether to hold a hearing. Yet, the PUCO properly permitted intervenors to engage in discovery to prepare for the potential hearing.

NOPEC's discovery requests<sup>29</sup> are tailored to elicit information that will lead to evidence on these same certification issues. The requests intend to show that FirstEnergy Advisors' management will be nearly indistinguishable from the management teams for FirstEnergy Corp, FirstEnergy Service Company and the FirstEnergy EDUs. See Joint Motion at 10-13. This commonality of management would prevent the EDUs from operating as fully separated affiliates from FirstEnergy Advisors. In that event, the FirstEnergy Advisors management team should not be allowed. R.C. 4928.17(A)(1). Without a proper management team identified, FirstEnergy Advisors' application cannot be approved, because FirstEnergy Advisors has failed to show that it has the managerial and technical capability in place to provide service. R.C. 4928.08 and O.A.C. 4901:1-24-10(C)(1). Moreover, NOPEC's discovery that seeks information regarding adherence to the corporate separation plan is relevant to determine if FirstEnergy Advisors is fit and capable of complying with the PUCO's rules and orders. O.A.C. 4901:1-24-10(C)(2). If FirstEnergy Advisors didn't want inquiry into these legitimate questions, it should not have stacked its officer and manager positions with the same individuals who hold senior positions with the EDUs.

#### **IV. CONCLUSION**

For the reasons set forth above, NOPEC respectfully requests that the Commission deny FirstEnergy Advisors' Motion for Protective Order, grant NOPEC's Motion to Compel Discovery and deny FirstEnergy Advisors' certification application.

---

<sup>29</sup> See Motion for Protective Order, Exhibit A.

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](mailto:gkrassen@bricker.com)  
(willing to accept service by email)

Dane Stinson (Reg. No. 0019101)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Telephone: (614) 227-4854  
Facsimile: (614) 227-2390  
Email: [dstinson@bricker.com](mailto:dstinson@bricker.com)  
(willing to accept service by email)

***Attorneys for Northeast Ohio Public  
Energy Council***

### **CERTIFICATE OF SERVICE**

In accordance with O.A.C. 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra Motion for Protective Order* was served on the persons stated below via electronic transmission this 1<sup>st</sup> day of April 2020.



---

Dane Stinson (0019101)

[lrader@firstenergycorp.com](mailto:lrader@firstenergycorp.com)  
[talexander@calfee.com](mailto:talexander@calfee.com)  
[khehmeyer@calfee.com](mailto:khehmeyer@calfee.com)  
[john.jones@ohioattorneygeneral.gov](mailto:john.jones@ohioattorneygeneral.gov)  
[trhayslaw@gmail.com](mailto:trhayslaw@gmail.com)  
[mwager@taftlaw.com](mailto:mwager@taftlaw.com)  
[iavalon@taftlaw.com](mailto:iavalon@taftlaw.com)  
[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  
[schmidt@sppgrp.com](mailto:schmidt@sppgrp.com)  
[angela.obrien@occ.ohio.gov](mailto:angela.obrien@occ.ohio.gov)  
[maureen.willis@occ.ohio.com](mailto:maureen.willis@occ.ohio.com)  
[larry.sauer@occ.ohio.com](mailto:larry.sauer@occ.ohio.com)  
[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  
[fykes@whitt-sturtevant.com](mailto:fykes@whitt-sturtevant.com)  
[john.jones@ohioattorneygeneral.gov](mailto:john.jones@ohioattorneygeneral.gov)  
[bethany.allen@igs.com](mailto:bethany.allen@igs.com)  
[joe.oliker@igs.com](mailto:joe.oliker@igs.com)  
[michael.nugent@igs.com](mailto:michael.nugent@igs.com)

Attorney Examiner:

[Megan.addison@puco.ohio.gov](mailto:Megan.addison@puco.ohio.gov)

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**4/1/2020 12:15:22 PM**

**in**

**Case No(s). 20-0103-EL-AGG**

Summary: Text Northeast Ohio Public Energy Council's Memorandum Contra FirstEnergy Advisors' Motion For Protective Order electronically filed by Teresa Orahod on behalf of Dane Stinson