

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Initial Certification)	
Application of Suvon, LLC d/b/a FirstEnergy)	Case No. 20-0103-EL-AGG
Advisors to Provide Aggregation and Broker)	
Services in the State of Ohio.)	

**SUVON, LLC D/B/A FIRSTENERGY ADVISORS' MEMORANDUM IN OPPOSITION
TO NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MOTION TO COMPEL**

I. INTRODUCTION

NOPEC's Motion to Compel must be denied because discovery from intervenors is not appropriate at this point. In addition to being premature, NOPEC improperly attempts to utilize discovery as a vehicle to obtain information from a competitor for its own competitive advantage. When FirstEnergy Advisors points out that NOPEC's wide ranging requests (such as INT-18(d) which seeks "customer lists, customer contact information and customer account information") have nothing to do with the relevant legal standard, NOPEC claims that FirstEnergy Advisors must have something "to hide." NOPEC cannot use a license application case to engage in a fishing expedition to accomplish its competitive goals or to obtain information to use in a separate corporate separation dispute. NOPEC's singular goal is obvious: fear of a competitor.

There can be no reasonable dispute that NOPEC's goals for this case have nothing to do with whether FirstEnergy Advisors meets the standards to serve as an Ohio broker. NOPEC admits it this much. The very first paragraph of NOPEC's introduction states NOPEC is truly concerned about EDU "market power, to the detriment of competition."¹ Rather than informing the Commission about this specific Application, NOPEC expressly states its purpose is to provide

¹ NOPEC Motion to Compel at 5.

“[t]he customers of FirstEnergy Corp’s Ohio electric distribution utilities” with information about affiliate relationships.² As discussed in more detail below, because NOPEC’s questions are all targeted at that issue instead of the only proper issue in this case—whether FirstEnergy Advisors meets the Commission criteria to serve as a broker—NOPEC’s Motion to Compel must be denied.

II. ARGUMENT

Ohio law is clear that a movant seeking to compel discovery must establish that the information sought through discovery is relevant to, and within the scope of, a proceeding.³ Where the movant fails to establish the relevance of the information, a motion to compel is properly denied.⁴ This is especially true in cases where, like here, the movant is utilizing discovery to pursue issues concerning matters “well beyond the scope of this proceeding.”⁵ Because NOPEC has failed to establish the relevance of the information it is seeking to discover, and is instead attempting to utilize discovery as an improper vehicle to gain access to competitive information to which it is not entitled, NOPEC’s Motion to Compel must be denied.

A. Discovery is premature at this point.

Prior to NOPEC filing its Motion to Compel, FirstEnergy Advisors filed a Motion for Protective Order, explaining in detail its reasons for asserting that engaging in any discovery is premature due to the lack of any procedural schedule or hearing being set.⁶ NOPEC raises this

² *Id.* at 1–2.

³ Ohio Admin. Code 4901-1-23(C).

⁴ See, e.g., *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates*, Case No. 93-432-TP-ALT, Entry (Mar. 24, 1994) (denying motion to compel where the movant “failed to establish the relevance of the information which it is seeking to discover”); see also *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Entry (Nov. 26, 1991) (denying motion to compel because discovery sought was irrelevant and concerns raised were better suited to be addressed in a different proceeding).

⁵ Case No. 93-432-TP-ALT, Entry (Mar. 24, 1994) (denying motion to compel because “[t]he issue being pursued by the [movant] is essentially a legal argument concerning matters which are well beyond the scope of this proceeding”).

⁶ See Suvon, LLC d/b/a FirstEnergy Advisors’ Motion for Protective Order.

same issue in its Motion to Compel, and has since incorporated this portion of its brief as part of its Memorandum Contra the Motion for Protective Order.⁷ To avoid the need for the Commission to review duplicative briefings on this same subject, FirstEnergy Advisors' upcoming Protective Order Reply Brief will respond to NOPEC's arguments on this point since it was first raised and briefed in association with the Motion for Protective Order.

B. NOPEC's discovery requests are not reasonably calculated to lead to the discovery of admissible evidence.

As this is an application proceeding, the proper scope of this matter is determined by OAC 4901:1-24-10(B). Specifically, when evaluating the application, the *Commission* "will consider the information contained in the applicant's application, supporting attachments and evidence, and recommendations of its *staff*" to determine if the applicant is "managerially, financially, and technically fit and capable of performing the service it intends to provide."⁸

The rules determine the scope of this case. Notably absent is NOPEC's role and an automatic process for discovery from intervenors or to obtain information to use in other cases.⁹ Instead, as NOPEC agrees, the only proper issue in this proceeding is whether FirstEnergy Advisors meets the Commission criteria to serve as a broker.¹⁰ Anything beyond this issue is not relevant and outside the scope of this proceeding, and thus not likely to lead to the discovery of admissible evidence.

As further set forth below, because the information NOPEC seeks and its reasons for seeking to compel discovery from FirstEnergy Advisors do not support NOPEC's claims of relevancy, nor are the discovery requests tailored to elicit information that are reasonably

⁷ Motion to Compel at 10–13; NOPEC Memorandum Contra FirstEnergy Advisors' Motion for Protective Order.

⁸ Ohio Admin. Code 4901:1-24-10(B) (emphasis added).

⁹ Motion to Compel at 14.

¹⁰ See Motion to Compel at 14.

calculated to lead to the discovery of admissible evidence, NOPEC's Motion to Compel must be denied.

1. Requests that seek the identity of employees and background information.

NOPEC objects to FirstEnergy Advisors use of shared service employees.¹¹ However Ohio has a long history of shared service employees working with both regulated and unregulated lines of business.¹² Ohio has also adopted OAC 4901:1-37-04(A)(5) and 4901:1-37-08, which specifically address how shared service employees should be accounted for under a cost allocation manual.

Focusing on specific requests, INT-02 seeks identification of all employees of FirstEnergy Advisors. INT-03 seeks identification of all employees of FirstEnergy Advisors who formerly were employed by FirstEnergy Solutions ("FES") as well as specifics concerning dates of hire and termination, positions or job titles of each employee while employed by FES and while employed by FirstEnergy Advisors.¹³ NOPEC claims this discovery is relevant "to determine the extent of the overlap of employees among the FirstEnergy Corp. affiliates to determine the extent to which FirstEnergy Advisors operate independently of the EDUs."¹⁴ NOPEC's Motion does not explain how the dates of employment with Energy Harbor, a company no longer affiliated with FirstEnergy Corp. or its distribution utilities, has any bearing on even that irrelevant question.

These requests perfectly encapsulate this dispute. NOPEC claims that it is entitled to a complete list of all employees and their job histories, but not because it wants to verify FirstEnergy Advisors meets the criteria to serve as a broker. Indeed, the request was not limited to the

¹¹ Motion to Compel at 6.

¹² This issue has been extensively briefed in this case, specifically with regard to NOPEC's contradictory arguments. *See* FirstEnergy Advisors' Memorandum in Opposition to the Motions to Suspend Filed by the Ohio Consumers' Counsel, NOPEC, NOAC, and Vistra Energy Corp. at 2-3.

¹³ INT-02 and INT-03.

¹⁴ Motion to Compel at 15.

employees demonstrating FirstEnergy Advisors is managerially, financially, and technically fit but would include everyone from sales staff to the janitorial team.

NOPEC instead argues it has a right to this information to address its concerns about potential future market power abuses which “would aid and abet illegal activities by the FirstEnergy EDUs and First Energy Advisors that could adversely affect the more than 500,000 customers served in NOPEC’s governmental aggregation program, as well as all customers throughout Ohio.”¹⁵ There is no reason for this hyperbole. NOPEC is seeking information it has no right to, to address a hypothetical future situation that doesn’t exist. NOPEC goes so far as to create a hypothetical sales preference program between the FirstEnergy EDUs and Energy Harbor (non-parties to this case) as justification for its requests from FirstEnergy Advisors.¹⁶ NOPEC’s hypothetical is completely unsupported by facts of any kind and doesn’t even make sense because Energy Harbor is no longer a FirstEnergy company. NOPEC then uses that unsupported hypothetical as justification for denying the Application.

Contrary to NOPEC’s factually and legally incorrect position, Ohio law permits use of shared service employees. The Commission is familiar with this and has approved such applications for decades. While NOPEC may disagree with Ohio law on this point, it does not follow that NOPEC may engage in a fishing expedition to obtain evidence for other cases or to blunt competition.

NOPEC also claims that this information is “necessary to assess FirstEnergy Advisors’ capability to provide service from a managerial and technical perspective.”¹⁷ This claim, too, lacks

¹⁵ Motion to Compel at 3.

¹⁶ Motion to Compel at 8 (“There can be formal or informal agreements between the FirstEnergy EDUs, First Energy Advisors and Energy Harbor to provide preferences to Energy Harbor to provide generation service to First Energy Advisors aggregation and/or brokerage customers.”).

¹⁷ Motion to Compel at 15.

credibility. As discussed above, NOPEC did not limit its requests to only those areas and instead sought information about every employee. More importantly, it is the Commission’s job to decide capacity to provide service—not NOPEC’s. There is a process for the Commission to obtain additional information if it has questions.¹⁸ FirstEnergy Advisors’ Application contains information related to the “managerial, technical, and financial capability” of the service FirstEnergy Advisors intends to provide.¹⁹ If the Commission seeks more information, it certainly can obtain it without NOPEC’s intervention.

2. Requests which seek charter documents, meeting minutes, and written actions of FirstEnergy Advisors, and information concerning past, current, and future positions held by principal officers, directors, and partners identified in FirstEnergy Advisors’ Application.

NOPEC next seeks identification and production of “all documents used to form Suvon, LLC” including operating agreements and articles of organization,²⁰ as well as “all meeting minutes and written actions of Suvon, LLC.”²¹ INT-07 through INT-17 seek identification of the past, current, and future positions, offices, and titles of specific individuals identified in FirstEnergy Advisors’ Application.²² NOPEC claims this information is relevant to determine whether FirstEnergy Advisors will function independently as a fully separate affiliate.²³ This reason is baseless, as NOPEC is conflating the legal standards governing FirstEnergy Advisors’ Application—as established in OAC 4901:1-24-10—with arguments about corporate separation that NOPEC wants to insert into this application case. While FirstEnergy Advisors is obligated to

¹⁸ OAC 4901:1-24-10(A)(2)(a).

¹⁹ See R.C. 4928.08(B); OAC 4901:1-24-10(B); OAC 4901:1-25-05.

²⁰ INT-05, RPD-4, RPD-5.

²¹ INT-06, RPD-6, RPD-7.

²² The individuals targeted include: Dennis M. Chack (INT-07); Brett W. Reynolds (INT-08); Steven R. Staub (INT-09); Ebony L. Yeboah-Amankwah (INT-10); Tracy M. Ashton (INT-11); Marlene A. Barwood (INT-12); Gregory J. Gawlik (INT-13); Charles E. Jones (INT-14); Steven R. Strah (INT-15); Lorraine M. Rader (INT-16); and Brian A. Farley (INT-17).

²³ Motion to Compel at 15–16.

meet the former, there is nothing in Ohio law that requires all these documents and information be disclosed to the Commission in this application process, much less be disclosed to intervenors.

Rather, a review of the requested information reveals that NOPEC's true reason for seeking this information is to gain access to competitively sensitive business information that NOPEC could use to compete against FirstEnergy Advisors. As an example, NOPEC's request for "all meeting minutes" could include competitively sensitive business information about business plans, customers, or other issues which NOPEC could then use to compete against FirstEnergy Advisors. NOPEC may not require the production of this information when it has nothing to do with the standard for granting a license application.

3. Requests seeking information concerning employees and their experience with prior employers.

INT-18 and INT-19²⁴ request the names of individuals supporting FirstEnergy Advisors, as well as the complete employment history of those individuals.²⁵ Subparts (d) and (g), respectively, of these requests then seek completely irrelevant information regarding "all documents related to the former entity's provision of energy services that these individuals have provided to FirstEnergy Advisors, including without limitation customer lists, customer contact information and customer account information."²⁶ NOPEC asserts three reasons why these requests are purportedly relevant to the instant case, none of which has merit.

First, NOPEC claims that this information is relevant to determine the managerial and technical capability the employees will provide FirstEnergy Advisors.²⁷ This reason, however,

²⁴ Along with related RPD 8, 9, 10, and 11.

²⁵ INT-18; INT-19.

²⁶ INT-18(d); INT-19(g).

²⁷ Motion to Compel at 16.

again detours from the actual requested information. Customer lists, customer contact information and customer account information do not relate to technical capacity in any way.

Second, NOPEC claims that this information is relevant to determine the extent to which former FES/Energy Harbor employees will be employed by FirstEnergy Advisors and, if so, the information the employees will provide to FirstEnergy Advisors.²⁸ Again, this request has nothing to do with the application approval process. In addition, Energy Harbor is no longer affiliated with FirstEnergy Corp. This request goes well beyond even NOPEC's expanded version of the case. And, in any event, there is no valid risk of customer information being misused. People change jobs in the industry every day. Ohio law expressly prohibits the misuse of customer account information.²⁹ As such, providing an intervenor with the names and employment history of every employee does nothing to protect customers. Rather, this is simply an attempt by NOPEC to seek information from a competitor to be used to gain a competitive advantage, which is improper.

Finally, NOPEC claims this information is relevant to determine whether the FirstEnergy EDU's could abuse their market power.³⁰ Again, this reason does not make sense in light of the specific information requested. Why would providing information currently in the hands of a **competitive** affiliate prove or disprove anything about whether information could be later shared with the **regulated** affiliate? Of course information can exist which should not be shared between regulated and unregulated entities. No party has contested that corporate separation rules require such information to be kept separate. Therefore, providing this information would establish nothing.

²⁸ Motion to Compel at 16.

²⁹ See OAC 4901:1-21-10 (prohibiting CRES from disclosing account numbers, social security numbers, and usage information absent extraordinary circumstances), 4901:1-10-12(F)(preventing electric utilities from disclosing account numbers, social security numbers, and usage information absent extraordinary circumstances).

³⁰ Motion to Compel at 16.

FirstEnergy Advisors' Application clearly establishes that it has the technical capacity to serve as a broker.³¹ It has the support of individuals with over 40 years' experience in the industry.³² Indeed, one wonders how any new applicant could possibly be better situated to start providing this competitive service in Ohio. NOPEC never contests this, and its requests are not seriously targeted at these issues. As there has been no party who has seriously challenged FirstEnergy Advisors' competence it is inappropriate for a competitor like NOPEC to request customer lists, contact information, and account information solely to attempt to gain a competitive advantage.

4. Seeking information regarding whether FES employees have shared proprietary information with FirstEnergy EDUs.

In INT-20, NOPEC seeks identification of all correspondence between FirstEnergy Advisors and FES and/or Energy Harbor Corp. including without limitation all letters of intent or contracts for aggregation or brokerage services that FirstEnergy Advisors entered into or is in discussions about with FES and Energy Harbor. NOPEC claims this information is relevant to determine whether FES employees have shared proprietary information with the FirstEnergy EDUs to the detriment of Ohio's competitive market and consumers, and abuse market power.³³

³¹ See Application Exhibit B-3 ("Combined, the Vice President of Sales and the Director of Sales have over 40 years of experience and knowledge providing energy sales and service to residential, commercial and industrial customers. The Director has over 10 years of experience working in the residential, commercial and industrial electric retail sales and marketing space, managing contracts and providing customer service to over 2 million customers in Ohio, Pennsylvania and Illinois. In the last 10 years, the Director has bid on and contracted with over 300 communities, serving over 14 TWHs of contracted electric load both directly and indirectly (through agents) to individual and aggregated residential and business customers across Ohio. The Director has extensive experience gathering and analyzing data to develop requests for pricing and negotiating contracts with communities and suppliers.")

³² See Application Exhibit B-3 ("Combined, the Vice President of Sales and the Director of Sales have over 40 years of experience and knowledge providing energy sales and service to residential, commercial and industrial customers. The Director has over 10 years of experience working in the residential, commercial and industrial electric retail sales and marketing space, managing contracts and providing customer service to over 2 million customers in Ohio, Pennsylvania and Illinois. In the last 10 years, the Director has bid on and contracted with over 300 communities, serving over 14 TWHs of contracted electric load both directly and indirectly (through agents) to individual and aggregated residential and business customers across Ohio. The Director has extensive experience gathering and analyzing data to develop requests for pricing and negotiating contracts with communities and suppliers.")

³³ Motion to Compel at 16-17.

Once again, the information requested is not related to the standard for serving as a broker or for sharing information with regulated affiliate. Energy Harbor is not an affiliate of FirstEnergy Advisors, and Energy Harbor is not a regulated utility. There is accordingly no way for FirstEnergy Advisors to provide anything Energy Harbor may have shared with any third party as such information would be outside its possession, custody, or control. Therefore, this request has nothing to do with information allegedly going to the EDUs, but rather shows that NOPEC's real purpose for seeking such information is to thwart competition. Further, because the information sought is irrelevant to whether FirstEnergy Advisors has the managerial and technical capability to be certified as a broker, it is outside the scope of this proceeding and therefore not reasonably calculated to lead to the discovery of admissible evidence.

Similarly, NOPEC's requests to produce all communications between any of the managers or officers of FirstEnergy Advisors "and any of the Officers and/or Directors of FirstEnergy Corp., FirstEnergy Services Company, Ohio Edison Company, The Cleveland Electric Illuminating Company, and/or The Toledo Edison Company" fail for the same reason.³⁴ Because none of these requested communications have anything to do with the legal standard in this case—whether FirstEnergy Advisors has the managerial and technical capability to be certified as a broker—they are not reasonably calculated to lead to the discovery of admissible evidence.

C. NOPEC's discovery requests are vague, overbroad, and unduly burdensome.

FirstEnergy Advisors also properly objected to certain discovery requests³⁵ as being vague, overbroad, and unduly burdensome. Because discovery is premature, and possibly not permitted at all here, the very act of making discovery requests is unduly burdensome. In addition, as discussed above, asking for specific dates of employment for entities other than FirstEnergy

³⁴ RPD-13, 14, 15, 16.

³⁵ INT-03, 06, 18(d), 19(g), 20; RPD-3, 5, 7, 9, 11, 13, 14, 15, 16.

Advisors, providing meeting minutes, and providing customer account numbers are simply overbroad and unduly burdensome.

The repeated requests for “all communications” from numerous individuals and entities about issues which are completely irrelevant to the sole issue in this proceeding are also unduly burdensome.

Further, NOPEC fails to justify the probative value of the information sought.³⁶ NOPEC’s claimed clarification regarding the information sought and its thinly-veiled attempts to further define and limit the requests do nothing to correct the fact that these requests are improper. As there is no probative value of the information requested, FirstEnergy Advisors properly objected to NOPEC’s requests.

D. FirstEnergy Advisors properly asserted objections based on confidentiality and privilege.

Although unclear from NOPEC’s Motion to Compel, to the extent that NOPEC claims FirstEnergy Advisors did not properly assert objections based on confidentiality and privilege, these arguments also fail. FirstEnergy Advisors properly objected to INT-20 because the information requested seeks confidential information. Specifically, NOPEC sought all correspondence between FirstEnergy Advisors and FES and/or Energy Harbor Corp. including all letters of intent or contracts for aggregation or brokerage services that FirstEnergy Advisors entered into or is in discussions about with FES and Energy Harbor.³⁷ As this request seeks direct information concerning highly competitive business information, FirstEnergy Advisors properly asserted an objection based on confidentiality.

³⁶ See Motion to Compel at 18.

³⁷ INT-20.

Likewise, NOPEC improperly claims that FirstEnergy Advisors objected to RPD-13 through RPD-16 “on the basis that the communications requested are privileged” and claims that a privilege log is therefore required for the allegedly privileged communications requested.³⁸ This is incorrect. FirstEnergy Advisors is objecting to the very requests themselves because discovery is premature and, as explained above, NOPEC is not entitled to the discovery it seeks. For this reason, no privilege log of communications is required, and the case support cited by NOPEC is unavailing.³⁹

III. CONCLUSION

For the foregoing reasons, FirstEnergy Advisors respectfully requests that the Commission deny NOPEC’s Motion to Compel. In addition to discovery being premature, the discovery requests for which NOPEC seeks to compel responses are irrelevant and outside the scope of this proceeding, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, and are sought for improper competitive purposes.

Respectfully submitted,

/s/ N. Trevor Alexander

N. Trevor Alexander (0080713)

Kari D. Hehmeyer (0096284)

CALFEE, HALTER & GRISWOLD LLP

1200 Huntington Center

41 South High Street

Columbus, Ohio 43215

Tel: (614) 621-7774

Fax: (614) 621-0010

talexander@calfee.com

khehmeyer@calfee.com

*Attorneys for Suvon, LLC d/b/a FirstEnergy
Advisors*

³⁸ Motion to Compel at 19.

³⁹ Motion to Compel at 19.

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 6th day of April 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander

One of the Attorneys for Suvon, LLC d/b/a
FirstEnergy Advisors

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/6/2020 4:39:44 PM

in

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

Summary: Memorandum In Opposition To NOPEC Motion To Compel electronically filed by Mr. Trevor Alexander on behalf of Suvon, LLC