

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio Edison )  
Company, The Cleveland Electric Illuminating )  
Company, and The Toledo Edison Company's )  
Compliance with R.C. 4928.17 and Ohio )  
Admin. Code Chapter 4902:1-37. )

Case No. 17-974-EL-UNC

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**NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S  
MOTION FOR LEAVE TO FILE A MOTION TO INTERVENE**

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By Entry issued September 20, 2018, the Attorney Examiner set a deadline of October 9, 2018 to intervene in this proceeding. By this motion, the Northeast Ohio Public Energy Council ("NOPEC") respectfully seeks leave to file its motion to intervention out of time. NOPEC recognizes that untimely motions to intervene will be permitted only under exceptional circumstances. O.A.C. 4901-1-11(F). NOPEC submits that exceptional circumstances in this proceeding warrant permitting it leave to seek formal intervention, as more fully detailed in the accompanying Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On May 14, 2018, an independent auditor filed its report in this proceeding after conducting a Commission-ordered investigation into the FirstEnergy electric distribution utilities' (the "EDUs")<sup>1</sup> compliance with their corporate separation plan.<sup>2</sup> The Audit Report focused on the EDUs' relationship with FirstEnergy Solutions Corp. ("FES"), which at that time was the EDUs' sole affiliated competitive retail electric service provider. By Entry of September 20, 2018, the Attorney Examiner set October 9, 2018 as the deadline to intervene in this case. The Northeast Ohio Public Energy Council ("NOPEC") did not formally intervene. Pursuant to a subsequent Attorney Examiner entry, however, NOPEC timely filed initial and reply comments to the Audit Report on December 31, 2018 and January 7, 2019, respectively.

Since this case commenced, FES filed for bankruptcy, was divested from the EDUs' parent holding company (FEC), and emerged from bankruptcy as a power marketer, Energy Harbor,

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<sup>1</sup> The FirstEnergy Ohio EDUs are The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company. Their parent holding company is FirstEnergy Corp ("FEC").

<sup>2</sup> See SAGE Management Consultants, LLC Final Report for Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio (May 14, 2018) ("Audit Report").

LCC, on February 27, 2020.<sup>3</sup> With FES's divestiture, many of the Audit Report's specific findings as to the EDUs' relationship with FES have become superseded by the same issues presenting themselves under facts relevant to the EDUs' new competitive retail electric service affiliate, Suvon, LLC d/b/a FirstEnergy Advisors ("FirstEnergy Advisors").

During FES's transition to becoming Energy Harbor, FirstEnergy Advisors filed an application with the Commission for certification as a power broker and aggregator on January 17, 2020.<sup>4</sup> NOPEC, Ohio's largest governmental aggregator (jointly with the Office of the Ohio Consumers' Counsel) moved to suspend the application on the basis that FirstEnergy Advisors' certification would result in the EDUs' non-compliance with certain of the Commission's corporate separation rules. NOPEC also moved to intervene in the *Certification Case*, citing the same corporate separation violations that would result from FirstEnergy Advisors' certification. The Attorney Examiner suspended the application as requested,<sup>5</sup> and the Commission granted NOPEC's unopposed motion to intervene.<sup>6</sup> By subsequent finding and order, the Commission ordered that the corporate separation issues presented by NOPEC and the other intervenors in the *Certification Case* be addressed in this proceeding.<sup>7</sup>

By entry in this case, the Attorney Examiner *sua sponte* took administrative notice of FirstEnergy Advisors' application and supplement (filed April 1, 2020) in the *Certification Case*.<sup>8</sup> The entry further requested that supplemental and supplemental reply comments be filed on May 29 and June 15, 2020, respectively. Under the Commission's order in the *Certification Case*,

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<sup>3</sup> See Case No. 00-1742-EL-CRS, Finding and Order (May 6, 2020).

<sup>4</sup> See Case No. 20-103-EL-AGG (January 17, 2020) ("*Certification Case*").

<sup>5</sup> *Certification Case*, Entry (February 11, 2020).

<sup>6</sup> *Certification Case*, Order (April 22, 2020) at 3.

<sup>7</sup> *Certification Case*, Order (April 22, 2020) at 5.

<sup>8</sup> Entry (April 29, 2020) at 3.

this is the only proceeding in which NOPEC may address the corporate separation issues in which it already was found to have a real and substantial interest in the *Certification Case*.

At the time of the October 9, 2018, intervention deadline, NOPEC could not have reasonably foreseen that FEC would form and seek certification (on January 17, 2020) of a brand new affiliated power broker/aggregator to compete in Ohio's competitive retail electricity market. Nor could NOPEC have foreseen that this proceeding would be used to address whether this new affiliated power broker/aggregator's management structure would violate the Commission's corporate separation rules. NOPEC submits that these extraordinary circumstances warrant its intervention in this case after the intervention deadline.

## **II. LAW & ARGUMENT**

R.C. 4903.221(B) and O.A.C. 4901-1-11(A)(2) govern intervention in Commission proceedings. NOPEC's separate motion to intervene filed simultaneously with this pleading, demonstrates its ability to meet the standards for intervention outlined in R.C. 4903.221(B) and O.A.C. 4901-1-11(A)(2).

By this pleading, NOPEC seeks leave to file its motion to intervene because the original intervention deadline of October 9, 2018 has passed. O.A.C. 4901-1-11(F) permits untimely intervention when "extraordinary circumstances" are present. Extraordinary circumstances in this proceeding warrant NOPEC's intervention.

Key to determining whether untimely intervention should be granted is whether the extraordinary circumstances leading to the intervention request could have been reasonably foreseen at the time of the intervention deadline. See, e.g., *In re Columbus Southern Power Co.*, Case No. 008-917-EL-SSO Entry (June 16, 2011). Indeed, in this very proceeding, the Retail Energy Supply Association was granted untimely intervention on the basis that it could not have reasonably foreseen that its complaint case against the EDUs, which raised similar corporate

separation issues, would be stayed pending resolution of this proceeding.<sup>9</sup> NOPEC's situation is practically indistinguishable because the corporate separation issues it raised in the separate *Certification Case* also have been reserved for ruling in this case.

Moreover, the May 14, 2018 Audit Report did not address the EDU's relationship with FirstEnergy Advisors, which had not yet been formed. At the time of the intervention deadline in the instant case (October 9, 2018), NOPEC could not have reasonably foreseen that FEC would create a brand new affiliated subsidiary (FirstEnergy Advisors), nor that the subsidiary would seek certification (on January 17, 2020) to compete with NOPEC and others in Ohio as an aggregator. Nor could NOPEC have foreseen that the material corporate separation issues raised in the *Certification Case*, would be reviewed in this case—by administrative notice of the very same documents NOPEC addressed in the *Certification Case*.

NOPEC was granted intervention in the *Certification Case* because of its real and substantial interest in addressing these corporate separation concerns. Under the Commission's order in the *Certification Case*, this is the only proceeding in which NOPEC can address the issues it raised in the *Certification Case*.

The Supreme Court of Ohio has held that the Commission's rules favor intervention.<sup>10</sup> Given the extraordinary circumstances discussed above, together with the Commission's and Court's precedent, show that it should be granted leave to seek formal intervention in this case.

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<sup>9</sup> See Attorney Examiner Entry (April 29, 2020) at 3.

<sup>10</sup> See *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384 (2006).

### III. CONCLUSION

Based on the foregoing, NOPEC respectfully requests that the Commission grant it leave to file its motion to intervene in this proceeding.

Respectfully submitted,



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### **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 *Motion to Intervene* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 29<sup>th</sup> day of May 2020.



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**Case No(s). 17-0974-EL-UNC**

Summary: Text Northeast Ohio Public Energy Council's Motion for Leave To File A Motion To Intervene electronically filed by Teresa Orahood on behalf of Dane Stinson