

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 17-0974-EL-UNC
Illuminating Company, and The Toledo)	
Edison Company's Compliance with)	
R.C. 4928.17)	

**MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY
TO NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MOTION FOR LEAVE TO
FILE A MOTION TO INTERVENE**

I. INTRODUCTION

This docket was opened on April 12, 2017 for the purpose of conducting an independent audit of Ohio Edison Company's, The Cleveland Electric Illuminating Company's, and the Toledo Edison Company's ("Companies") compliance with corporate separation rules.¹ Despite a September 20, 2018 Attorney Examiner Entry setting an intervention deadline of October 9, 2018,² and despite an April 29, 2020 Attorney Examiner Entry that confirmed that the intervention deadline expired on October 9, 2018 and would not be modified or extended,³ NOPEC now seeks leave to intervene in this case.⁴ NOPEC's motion is untimely, fails to present extraordinary circumstances as required by Ohio Administrative Code ("O.A.C.") 4901-1-11(F), and should be denied. NOPEC's contemporaneously filed Motion to Intervene should be stricken and/or denied.

¹ Case Opening Memorandum (4/12/2017). This docket was opened as a result of the Commission's Finding and Order in the Retail Markets Investigation ("RMI"). Case No. 12-3151-EL-COI, Finding and Order (3/26/2014). Movant, the Northeast Ohio Public Energy Council ("NOPEC") was an active participant in the RMI and moved to intervene in that case more than seven years ago on February 26, 2013. As a party in the RMI, NOPEC has known of the independent audit of the Companies since it was first ordered by the Commission, yet it waited until well-after the deadline in this case before seeking leave to intervene.

² Entry (9/20/2018) at ¶18.

³ Entry (4/29/2020) at ¶9.

⁴ Northeast Ohio Public Energy Council's Motion for Leave to File a Motion to Intervene (5/29/2020) ("Motion for Leave").

II. LAW AND ARGUMENT

A. NOPEC's Motion for Leave is Untimely.

NOPEC's Motion for Leave is untimely and should be denied. On September 20, 2018, the Attorney Examiner directed that all motions to intervene in this case must be filed by October 9, 2018.⁵ NOPEC did not move to intervene by the deadline. However, it did have notice of the proceedings as evidenced by its filing of both initial comments on December 31, 2018⁶ and reply comments on January 7, 2019.⁷ On April 29, 2020, the Attorney Examiner issued an entry ("Entry") setting deadlines for supplemental comments and supplemental reply comments.⁸ The Entry made plain that the deadline for intervention in this proceeding has passed and is not extended: "[t]he examiner notes that this opportunity for interested persons to file supplemental comments and supplemental reply comments **should not be construed to modify or extend the existing intervention deadline in this proceeding of October 9, 2018.**"⁹ NOPEC's Motion for Leave, which was filed more than one and one half years after the intervention deadline (and one month after the Attorney Examiner Entry confirming that the deadline had passed and was not modified) is untimely and should be denied.

B. NOPEC Has Failed to Present Extraordinary Circumstances for Intervention, as Required by O.A.C. 4901-1-11(F).

"A motion to intervene which is not timely will be granted only under extraordinary circumstances."¹⁰ NOPEC has failed to demonstrate that extraordinary circumstances exist here. NOPEC argues that its late intervention should be allowed because it intervened in and had an

⁵ Entry (9/20/2018) at ¶18.

⁶ Initial Comments of Northeast Ohio Public Energy Council (12/31/2018).

⁷ Reply Comments of Northeast Ohio Public Energy Council (1/7/2019).

⁸ Entry (4/29/2020).

⁹ Entry (4/29/2020) at ¶9 (emphasis added).

¹⁰ O.A.C. 4901-1-11(F).

interest in Suvon, LLC’s certification application docket,¹¹ where NOPEC sought to address perceived corporate separation issues.¹² NOPEC asserts that it was granted intervention in the Certification Case “because of its real and substantial interest in addressing these corporate separation concerns.”¹³ However, NOPEC overstates the precedential import of its intervention in the Certification Case, which (unlike in the present case) was based upon a timely and unopposed motion to intervene and was granted without discussion or analysis of its allegedly real and substantial interest.¹⁴ NOPEC’s unopposed intervention in the Certification Case is not an extraordinary circumstance that would justify its untimely intervention in this case.

NOPEC also argues that it should be granted untimely intervention because the Retail Energy Supply Association (“RESA”) was allowed to intervene after the deadline.¹⁵ However, the exception that was made for RESA does not apply to NOPEC. RESA was in the unique situation of having filed a complaint against the Companies prior to the filing of the audit report, but then having its complaint case stayed after the October 9, 2018 intervention deadline had passed and pending the outcome of this proceeding.¹⁶ The Attorney Examiner concluded that RESA could not have reasonably foreseen that its complaint would be stayed pending the outcome of the audit proceeding.¹⁷ NOPEC, on the other hand, has waited one and one half years beyond the intervention deadline to seek leave to intervene in this proceeding – even though it was aware of the case and actively participating at least as early as December 31, 2018.¹⁸ If the Attorney

¹¹ Case No. 20-0103-EL-AGG (“Certification Case”).

¹² Motion for Leave at 5.

¹³ *Id.*

¹⁴ Case No. 20-103-EL-AGG, Finding and Order (4/22/2020) at ¶ 11 (stating, in total, that: “Motions to intervene in this proceeding have been filed by OCC, NOPEC, Vistra and NOAC. No party opposed the motions. The Commission finds that the motions to intervene are reasonable and should be granted.”)

¹⁵ Motion for Leave at 4-5.

¹⁶ *See*, Entry (4/29/2020) at ¶¶ 11 -12.

¹⁷ *Id.* at ¶12.

¹⁸ Initial Comments of Northeast Ohio Public Energy Council (12/31/2018).

Examiner had intended to apply RESA's exception to NOPEC (or to carve out an intervention option for all parties to the Certification Case generally), he could have done so. Instead, he instructed that the October 9, 2018 intervention deadline would not be modified or extended.¹⁹

NOPEC argues that it has an interest in addressing what it perceives as "corporate separation concerns."²⁰ However, NOPEC can – and has – presented its concerns by filing comments,²¹ reply comments,²² supplemental comments,²³ and presumably supplemental reply comments in this docket. NOPEC has been afforded the opportunity to express its concerns, and thus has not presented an extraordinary circumstance that would merit untimely intervention.

III. CONCLUSION

For the foregoing reasons, NOPEC's Motion for Leave to File a Motion to Intervene should be denied and NOPEC's contemporaneously filed Motion to Intervene should be stricken and/or denied.

¹⁹ Entry at ¶¶ 9-12.

²⁰ Motion for Leave at 5.

²¹ Initial Comments of Northeast Ohio Public Energy Council (12/31/2018).

²² Reply Comments of Northeast Ohio Public Energy Council (1/7/2019).

²³ Supplemental Comments of Northeast Ohio Public Energy Council (5/29/2020).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Northeast Ohio Public Energy Council's Motion for Leave to File a Motion to Intervene was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 15th day of June 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Christine E. Watchorn

*An Attorney for Ohio Edison Company, The
Cleveland Electric Illuminating Company
and The Toledo Edison Company*

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

Summary: Memorandum Contra to Northeast Ohio Public Energy Council's Motion for Leave to File a Motion to Intervene electronically filed by Ms. Christine E. Watchorn on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company