BEFORE THE

PUBLIC UTILITIES COMMISSION OF OHIO

|  |  |  |
| --- | --- | --- |
| In the Matter of the Certification of Northeast Ohio Public Energy Council as Governmental Aggregator | )))) | Case No. 00-2317-EL-GAG |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

REPLY MEMORANDUM IN SUPPORT OF

TRANSALTA ENERGY MARKETING (U.S.) INC.’S MOTION TO INTERVENE

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. introduction

On September 27, 2022, pursuant to R.C. 4903.221 and Ohio Admin. Code 4901-1-11, TransAlta Energy Marketing (U.S.) Inc. (“TransAlta”) moved to intervene in the above-captioned proceeding in connection with the Northeast Ohio Public Energy Council’s (“NOPEC’s”) dropping of over half a million of its Standard Program Price customers from its current three-year aggregation program and returning them prematurely to the standard service offer (“SSO”) programs of Cleveland Electric Illuminating Company and Ohio Edison Company (together, “FirstEnergy”) and Ohio Power Company (“AEP Ohio”). NOPEC’s load shift will have significant impacts on TransAlta and Ohio’s competitive electric service market, and TransAlta seeks intervention without limitation in this proceeding.

 On October 4, 2022, NOPEC filed a Memorandum Contra TransAlta’s Motion to Intervene,[[1]](#footnote-1) which mischaracterizes the Public Utilities Commission of Ohio’s (“Commission’s”) liberal intervention standard, provides no basis for denying TransAlta’s intervention, and relies primarily on broad and unsupported allegations that have no basis in fact, law, or prior Commission precedent. Accordingly, the Commission should reject NOPEC’s arguments and grant TransAlta’s motion to intervene.[[2]](#footnote-2)

1. law and argument

The Commission has a long-standing policy of encouraging broad participation in its proceedings.[[3]](#footnote-3) Indeed, intervention rules should “generally [be] liberally construed in favor of intervention,”[[4]](#footnote-4) and this liberal construction applies “whether or not a hearing is held.”[[5]](#footnote-5) Moreover, a party should be granted intervention when it meets the five factors articulated in the rules, absent “evidence in the record calling those claims into doubt” or establishing that intervention would cause undue delay.[[6]](#footnote-6)

TransAlta has demonstrated that it meets the five factors the Commission uses in evaluating whether to permit intervention. Specifically, TransAlta has been directly impacted by NOPEC’s unprecedented actions because TransAlta is currently responsible for serving 7% and 4% of the SSO load in the FirstEnergy and AEP Ohio service territories, respectively. Accordingly, TransAlta has a real and substantial interest in this proceeding. No other party can represent TransAlta’s business interests with respect to its own SSO load obligations and the impact of NOPEC’s actions on TransAlta. TransAlta’s supporting memorandum further demonstrates that its intervention will not cause undue delay and is in the public interest,[[7]](#footnote-7) and that its legal position is consistent with the Commission’s reasons for directing NOPEC to show cause demonstrating why its certificate should not be suspended. Thus, TransAlta meets the Commission’s liberal standard for intervention and its motion to intervene should be granted.

Rather than respond to TransAlta’s arguments or provide any particularized basis to deny TransAlta’s intervention, NOPEC spends most of its time arguing that TransAlta does not have a right to intervene in a proceeding that involves a “mere filing” of a Notice of Material Change.[[8]](#footnote-8) But NOPEC misses the point. First, even if there is no right to intervene here, intervention is nevertheless *permissive*. Second, so much more is at stake here than a “mere filing.” In fact, NOPEC’s characterization of its unilateral decision to return prematurely over 500,000 customers to SSO service—and its apparent ignorance of the significant impact that its actions will have on SSO load suppliers, SSO auctions, and the wider Ohio electric market—underscores why granting TransAlta party status is essential to ensure its interests in this proceeding are adequately protected.

NOPEC claims TransAlta’s intervention should be denied because its interests can be protected by the submission of comments as sought by the Commission in the Show Cause Entry. But allowing the mere submission of comments does not provide TransAlta full rights as a party to this proceeding. Indeed, *Ohio Domestic Violence Network v. Pub. Utils. Comm’n*, 1994-Ohio-165, 70 Ohio St. 3d 311, 315-16, 638 N.E.2d 1012 (1994), makes clear intervention is necessary for TransAlta to preserve its appellate rights, including the right to seek rehearing of any adverse rulings in this proceeding.

NOPEC further argues that, essentially, TransAlta’s only interest in this proceeding is the underlying legal issue or the precedent to be set, and that its intervention is “an obvious attempt … to duplicate the efforts of Dynegy.”[[9]](#footnote-9) Again, NOPEC misses the mark. TransAlta seeks intervention to address whether NOPEC’s actions would result in the suspension of NOPEC’s certification and the effect of those actions and the Commission’s rulings in this case, as specific to TransAlta. There is no other party, including Dynegy Marketing and Trade, LLC, that can understand how NOPEC’s load-shifting will impact TransAlta’s business operations, and how that specific impact could more broadly adversely affect “wholesale auctions which provide the generation for SSO service in all Ohio EDUs service territories.”[[10]](#footnote-10) Accordingly, TransAlta’s interest in this proceeding is not duplicative or merely based on precedential interest. To the contrary, TransAlta has a direct and substantial business interest that cannot be represented by any other party, and should therefore be allowed to contribute to the development of the record and actively participate as a party in these proceedings.

Indeed, NOPEC’s Memorandum Contra largely relies on broad conclusory statements that are unsupported by any evidence, facts, case law, or precedent, and should thereby be rejected. For example, in asserting that TransAlta’s intervention will unduly delay the proceeding, NOPEC merely concludes “TransAlta seeks intervention to engage in a campaign against NOPEC,”[[11]](#footnote-11) and that its intervention “will ultimately result in overbroad and unwarranted discovery requests that go well beyond the narrow scope of this proceeding.”[[12]](#footnote-12) However, NOPEC provides no evidence or facts to support its assertions. NOPEC also claims, without any basis, that TransAlta “intends to make general and vague allegations,”[[13]](#footnote-13) is “blaming NOPEC for its own failures in assessing the risk of being an SSO supplier,”[[14]](#footnote-14) and that TransAlta intends to “misuse the intervention process . . . to advance its self-serving interests of avoiding its contractual commitments.”[[15]](#footnote-15) But again, NOPEC provides no evidence to support these assertions. Its conclusory and unsupported allegations must fail.

1. Conclusion

WHEREFORE, for the foregoing reasons, TransAlta respectfully requests that the Commission grant its motion to intervene in this proceeding. Because TransAlta may be bound by any Commission order or activity in this proceeding and may be adversely affected thereby, and because TransAlta’s interests in this proceeding cannot be represented by any other party, TransAlta respectfully requests its motion to intervene be granted without limitation.

|  |  |
| --- | --- |
| Dated: October 11, 2022 | Respectfully submitted,*/s/ Kimberly Frank*Kimberly B. Frank, Counsel of RecordPHV-26301-2022K&L Gates LLP 1601 K Street, NW Washington, DC 20006Tel: 202-778-9064Fax: 202-778-9100Email: kimberly.frank@klgates.comJanessa Glenn (0100782)K&L Gates LLP2801 Via Fortuna, Suite 650Austin, Texas  78746-7568Tel: 512-482-6866Fax: 512-482-6859Email: janessa.glenn@klgates.com**Willing to Accept Service by Email*****COUNSEL FOR TRANSALTA ENERGY MARKETING (U.S.) INC.*** |

CERTIFICATE OF SERVICE

I certify on this 11th day of October, 2022, that the foregoing document was filed using the Commission’s Docketing Information System and was served by electronic mail on the following:

|  |  |
| --- | --- |
| Dane Stinson Devin D. ParramDrew H. Campbell Matthew W. WarnockBricker & Eckler, LLP100 S. Third Street Columbus, OH 43215-4291 dstinson@bricker.comdparram@bricker.comdcampbell@bricker.commwarnock@bricker.comDavid F. ProañoTaylor M. Thompson James H. Rollinson Patrick T. Lewis Kyle T. CuttsBaker & Hostetler LLP 127 Public Square, Suite 2000 Cleveland, OH 44114 dproano@bakerlaw.com tathompson@bakerlaw.com jrollinson@bakerlaw.com plewis@bakerlaw.com kcutts@bakerlaw.com | Thomas LindgrenRhiannon PlantAssistant Ohio Attorneys GeneralPublic Utilities Section30 East Broad StreetColumbus, OH 43215Thomas.Lindgren@OhioAGO.govRhiannon.Plant@OhioAGO.govSteven T. NourseAEP Service Corporation1 Riverside PlazaColumbus, OH 43215stnourse@aep.comLarry SauerJohn FinniganMaureen R. WillisAlana M. NowardOffice of the Ohio Consumers’ Counsel65 East State Street, Suite 700Columbus, OH 43215Larry.Sauer@occ.ohio.govJohn.Finnigan@occ.ohio.govMaureen.Willis@occ.ohio.govAlana.noward@occ.ohio.gov |
|  |  |
| Ali I. Haque Baker & Hostetler LLP 200 Civic Center Drive, Suite 1200 Columbus, OH 43215 ahaque@bakerlaw.comBrian KnipeFirst Energy Corp.76 South Main StreetAkron, OH 44308bknipe@firstenergycorp.comEvan BettertonStacie CathcartIGS Energy6100 Emerald ParkwayDublin, OH 43016evan.betterton@igs.comstacie.cathcart@igs.com | Michael DortchJustin M. DortchRichard R. ParsonsKravitz, Brown & Dortch, LLC65 East State Street, Suite 200Columbus, OH 43215mdortch@kravitzllc.comjdortch@kravitzllc.comrparsons@kravitzllc.comMichael A. Yuffee (*pro hac vice pending*)PHV#260362002Ryan Norfolk (*pro hac vice pending*)PHV # 26248-2002Baker Botts, LLP700 K Street, NWWashington, DC 20001michael.yuffee@bakerbotts.comryan.norfolk@bakerbotts.com |
| Dona Seger-LawsonAEP Indiana Michigan110 E. Wayne St.Fort Wayne, IN 46802Dgseger-lawson@aep.comThomas M. BellishBuckeye Energy Brokers, Inc.65 East Mill StreetAkron, OH 44308tb@buckeyeenergybrokers.comChristine E. WatchornZachary E. WoltzFirstEnergy Service CompanyColumbus, Ohio 43215cwatchorn@firstenergycorp.comzwoltz@firstenergycorp.com | Michael R. GladmanShalini B. GoyalMargaret M. DenglerRyan A. DoringoJones Day325 John H. McConnell Blvd., Suite 600Columbus, Ohio 43215mrgladman@jonesday.comsgoyal@jonesday.commdengler@jonesday.comradoringo@jonesday.com |

 Respectfully submitted,

*/s/ Kimberly Frank*

Kimberly Frank (PHV-26301-2022)

kimberly.frank@klgates.com

1. Memorandum Contra Motion to Intervene by TransAlta Marketing and Trade, LLC, *In re Certification of Ne. Ohio Pub. Energy Council as Governmental Aggregator*, Case No. 00-2317-EL-GAG (filed Oct. 4, 2022) (“Memorandum Contra”). Notably, NOPEC’s Memorandum Contra incorrectly identifies TransAlta as “TransAlta Marketing and Trade, LLC.” The movant’s correct business name is TransAlta Energy Marketing (U.S.) Inc. [↑](#footnote-ref-1)
2. During a pre-hearing conference held on October 4, 2022, the Attorney Examiner did not rule on any motions to intervene filed in this proceeding and set a date for all such motions to be filed by November 3, 2022. TransAlta interprets this to mean its request for expedited treatment has been denied and thereby it may reply to NOPEC’s Memorandum Contra under Ohio Admin. Code 4901-1-12(C). To the extent necessary, TransAlta seeks waiver of the Commission’s rules for leave to file this reply. [↑](#footnote-ref-2)
3. *In re Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR, 1986 WL 1262093, Entry at ¶ 6 (issued Jan. 14, 1986) (“The Commission’s policy is to encourage the broadest possible participation in its proceedings.”). [↑](#footnote-ref-3)
4. *Ohio Consumers’ Counsel v. Pub. Utils. Comm’n*, 111 Ohio St.3d 384, 388, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 16 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995)). [↑](#footnote-ref-4)
5. *Id.* at ¶ 20. [↑](#footnote-ref-5)
6. *Id.* [↑](#footnote-ref-6)
7. *See* Memorandum in Support of Motion to Intervene by TransAlta Energy Marketing (U.S.) Inc., *In re Certification of Ne. Ohio Pub. Energy Council as Governmental Aggregator*, Case No. 00-2317-EL-GAG, at pp. 9-10 (filed Sept. 27, 2022). Indeed, TransAlta’s participation in this proceeding will not cause undue delay, will not unjustly prejudice any existing party, and is in the public interest because the Commission has explicitly sought comments from interested parties—*i.e.,* SSO suppliers like TransAlta—concerning NOPEC’s actions. *In re Certification of Ne. Ohio Pub. Energy Council as Governmental Aggregator*, Case No. 00-2317-EL-GAG (issued Sept. 7, 2022) and *In re Motion of Ne. Ohio Pub. Energy Council for a Limited Waiver*, Case No. 22-806-EL-WVR, Entry at ¶ 13 (issued Sept. 7, 2022) (“Show Cause Entry”). During the October 4, 2022 pre-hearing conference, the Attorney Examiner provided more time for interested parties to consider NOPEC’s responses to discovery and to file comments, extending the deadline for comments and reply comments to October 27, 2022, and November 3, 2022, respectively. [↑](#footnote-ref-7)
8. Memorandum Contra at pp. 2-3. [↑](#footnote-ref-8)
9. *Id*. at p. 4. [↑](#footnote-ref-9)
10. Show Cause Entry at ¶ 14. [↑](#footnote-ref-10)
11. Memorandum Contra at p. 5. [↑](#footnote-ref-11)
12. *Id*. [↑](#footnote-ref-12)
13. *Id*. at p. 4. [↑](#footnote-ref-13)
14. *Id*. at p. 1. [↑](#footnote-ref-14)
15. *Id*. at p. 6. [↑](#footnote-ref-15)