BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of The East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Alternative Form of Regulation.	)))	Case No. 19-0468-GA-ALT

DOMINION ENERGY OHIO'S MOTION FOR LEAVE TO FILE SURREPLY

In accordance with Rule 4901-1-12, The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO) respectfully requests an order authorizing DEO to file the Surreply (attached as Attachment A) in response to the Reply filed by the Northeast Ohio Public Energy Council (NOPEC).

Although the Commission's rules do not expressly authorize surreplies, the Commission has permitted parties to file surreplies to prevent prejudice and so that the Commission is fully informed as to the merits of the issues before it. *See, e.g.*, *In re Appl. of DP&L for Approval of an Elec. Security Plan*, Case No. 16-395-EL-SSO, Entry (July 11, 2016); *In re Complaint of McLeodUSA Telecommunications Services, Inc. v. AT&T Ohio*, Case No. 11-3407-TP-CSS, Entry (Oct. 12, 2011); *In re Complaint of Time Warner Telecom of Ohio, L.P. v. Ameritech Ohio*, Case No. 02-796-TP-CSS, Opin. & Order at 22 (Nov. 10, 2004). If the Commission grants this Motion, DEO has no objection to an order permitting NOPEC to file a response to DEO's Surreply.

Good cause exists to grant this Motion for Leave for the reasons that follow. In its Motion to Intervene, NOPEC asserted that it "provides energy aggregation service" to "retail natural gas customers" in DEO's service territory. (Mot. at 1.) NOPEC alleged that it has been "an active participant on Ohio's competitive natural gas and electric markets" and "has arranged supply contracts" since 2001. (*Id*.) NOPEC claimed that it had a "real and substantial interest" in ensuring that its "natural gas aggregation customers" are assessed just and reasonable rates for

natural gas distribution service. (*Id*. at 2.) In short, NOPEC's Motion focused on its role as an aggregator of the natural gas commodity, and did not contain any argumentation purporting to support its intervention in a distribution case. On that basis, DEO opposed NOPEC's intervention.

In its Reply, NOPEC considerably and for the first time in this proceeding, elaborated on the scope of its alleged authority. It claims that its mission involves "consumer advocacy of behalf of its governmental members and their constituents" and says that it sought to intervene in this case, not to protect its own competitive interests, but "to protect the interests of its member communities and the residential and business customers in those [] member communities." (Rep. at 1.) NOPEC asserted, for the first time on reply, that its "broad authority" to act on behalf of its member communities is rooted in R.C. 167.03 and the NOPEC "Natural Gas Aggregation Program Plan of Operation & Governance for Member Communities" (Natural Gas Aggregation Program POG). (Rep. at 2.)

Although NOPEC's motion asserts that counsel "failed to recognize" certain features of NOPEC's authority, the reality is that DEO's counsel reasonably relied on NOPEC's *own* explanation of its interests, which was limited to aggregation services. NOPEC has now provided a new and expanded explanation of its interests and the legal basis for its intervention. These were all points that could have and should have been made in NOPEC's original Motion to Intervene, and the failure to make those points deprived DEO of an opportunity to respond. Nevertheless, rather than file a motion to strike the reply, DEO is merely seeking a fair opportunity to respond to NOPEC's newly articulated position.

Granting this Motion will ensure that the Commission has a complete basis for decision on NOPEC's Motion to Intervene. Nor will granting this Motion prejudice any party. DEO is

filing this Motion well within the period typically allowed for memoranda contra, and as yet there is no procedural schedule or deadline for intervention, so there is ample time for full consideration of these issues. Denying this Motion, however, would prejudice DEO, who is the applicant in this proceeding and who would otherwise be declined a fair opportunity to respond to the arguments raised for the first time in NOPEC's reply.

Dated: July 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing document was served by electronic mail upon the following individuals on July 24, 2019:

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ATTACHMENT A

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of The East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Alternative Form of Regulation.	)))	Case No. 19-0468-GA-ALT

DOMINION ENERGY OHIO'S SURREPLY IN OPPOSITION TO NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MOTION TO INTERVENE

The standards for intervention in a Commission proceeding require more than just having customers who share a common interest. The association, in this case the Northeast Ohio Public Energy Council (NOPEC), must have clear authorization from its members to assert that interest on their behalf. This is the fundamental flaw in NOPEC's attempted intervention. Its member communities and their constituents may in fact share a common interest in just and reasonable delivery rates. But that shared concern alone does not give NOPEC standing to assert, possess, and protect its supply customers' interests in delivery rate cases. There needs to be some showing that NOPEC is authorized to speak on their customers' behalf in this proceeding on issues that do not affect the price, terms, or conditions of commodity sales service.

As explained in this Surreply, in which The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO) responds to assertions made for the first time on Reply, the plain language of the law and the weight of the facts support the conclusion that NOPEC's customers cannot and (at a minimum) did not properly authorize NOPEC to represent them in legal proceedings concerning delivery costs and rates. This is entirely consistent with NOPEC's statutory purpose and role as a community aggregator. NOPEC thus cannot establish that it possesses a protectable real and substantial interest that warrants its presence in this case. NOPEC's motion to intervene should be denied.

I. BACKGROUND

In its Motion to Intervene, NOPEC asserted that it "provides energy aggregation service" to "retail natural gas customers" in DEO's service territory. (Mot. at 1.) NOPEC alleged that it has been "an active participant on Ohio's competitive natural gas and electric markets" and "has arranged supply contracts" since 2001. (*Id*.) NOPEC claimed that it had a "real and substantial interest" in ensuring that its "natural gas aggregation customers" are assessed just and reasonable rates for natural gas distribution service. (*Id*. at 2.)

NOPEC's description, focusing on its role as an aggregator, matched DEO's understanding of NOPEC's role and responsibilities, an understanding gained through experience and also supported by NOPEC's own publications. According to "Who is NOPEC":

> **Our Mission**
>
> NOPEC has three components to its mission: we aggregate, educate and advocate for our member communities. As a not for profit organization, we negotiate for lower energy rates and better terms and conditions. We educate residents and customers in member communities on how they can conserve energy and save even more on their energy bills. And we advocate for consumer-friendly energy legislation at both the state and federal level.[1]

None of the purposes comprising NOPEC's mission—aggregation of supply to reduce energy rates, education on energy efficiency issues, and advocacy for energy legislation—appeared to have any connection to this case.

DEO therefore opposed NOPEC's intervention. DEO's application does not propose a change to a rate, tariff, or service affecting NOPEC's duties as an aggregator or its customers' interests in the acquisition of the gas commodity. DEO argued that NOPEC has not shown that its authorization (to procure competitive retail natural gas services, i.e., the natural gas

[1] *See* https://www.nopec.org/who-is-nopec/ (last visited July 24, 2019).

commodity, for its members) allows it to represent its *supply* customers in a proceeding concerning DEO's *delivery* rates.

In its Reply, however, NOPEC claims that its mission involves "consumer advocacy of behalf of its governmental members and their constituents" and says that it sought to intervene in this case, not to protect its own competitive interests, but "to protect the interests of its member communities and the residential and business customers in those [] member communities." (Rep. at 1.) NOPEC asserts, for the first time on reply, that this "broad authority" to act on behalf of its member communities is rooted in R.C. 167.03 and the NOPEC "Natural Gas Aggregation Program Plan of Operation & Governance for Member Communities" (Natural Gas Aggregation Program POG). (Rep. at 2.) NOPEC argues that its members' adoption of the Natural Gas Aggregation Program POG, by local ordinance, authorizes NOPEC to stand in their shoes and represent them in Commission proceedings on any issue of common concern. (*Id*.) NOPEC contends that its authorized representation includes "local gas distribution companies' regulatory proceedings that will increase constituents' overall price for natural gas service." (*Id*.) Indeed, NOPEC rejects any limit on its representation to cases that affect aggregation or commodity-sales-service issues.

DEO seeks leave to file this Surreply to address NOPEC's new allegations in support of intervention. As explained below, NOPEC fails to demonstrate that its authorization extends to represent its member communities in cases before the Commission that do not concern its role as an aggregator of commodity service.

II. DISCUSSION

NOPEC's claim that it has been authorized to represent customers in a case solely affecting a rate for distribution service does not withstand close review. The law that allegedly

creates such authority—R.C. 4929.26—is limited to the aggregation of competitive retail natural gas services, i.e., commodity sales services, a service that DEO's application does not affect. And even if the laws cited by NOPEC generally permitted an aggregator to represent the interests of distribution consumers, the ordinances that actually grant NOPEC authority do not stretch so far, but are limited to aggregation services.

DEO's position is not that NOPEC can never participate in a distribution rate case. Many such cases directly or indirectly affect services that are important to NOPEC's role as an aggregator. But this is not such a case—the only proposal in this case is to establish a distribution rate (the CEP Rider). This case does not present even an *arguable* connection to aggregation, which is confirmed by the fact that NOPEC, even after being made aware of DEO's opposition, has not cited such a connection.

In short, NOPEC's legitimate areas of concern are not affected by this case, and its motion to intervene should be denied.

A. The laws cited by NOPEC as authorizing its representation of distribution customer interests do no such thing.

NOPEC asserts that R.C. 167.03 gives it broad authority to represent its member communities in this and other Commission proceedings concerning delivery rates. R.C. 167.03(C) provides that "[t]he council may, *by appropriate action of the governing bodies* of the members, perform such other functions and duties as are performed or capable of performance by the members and necessary or desirable for dealing with problems of mutual concern." (Emphasis added.) But this statute is not self-implementing. By its terms, R.C. 167.03(C) requires an "*appropriate* action" by its "governing bodies" to authorize NOPEC to perform specific "functions and duties." NOPEC has not demonstrated that its member communities have

actually and appropriately granted NOPEC authorization to intervene in cases solely concerning distribution costs.

The only authorization claimed by NOPEC is the "Natural Gas Aggregation Program Plan of Operation & Governance," which NOPEC calls the "POG." The very title of this document supports DEO's position—it governs the aggregation of the natural gas commodity—and a closer look confirms it. Notably, although NOPEC was formed under R.C. 167.03, the POG was *not*, but was adopted under a different statute, R.C. 4929.26. (*See* Case No. 02-1688-GA-GAG, NOPEC Renewal Appl., Section B.) And contrary to NOPEC's assertion that it has been broadly authorized to represent consumers in general rate-setting matters, that statute limits NOPEC's authorization to competitive retail service issues.

R.C. 4929.26(A) provides that a municipality, township, or county may adopt a resolution to "aggregate automatically … competitive retail natural gas service" for the retail loads in its area. R.C. 4929.26(C) provides that the local government, upon adopting aggregation, "shall develop a plan of operation and governance for the aggregation program so authorized." NOPEC claims that R.C. 4929.26 does not limit NOPEC to procuring natural gas commodity supply. (Rep. at 2.) But this ignores the plain language of the statute, which does not authorize ordinances or plans affecting any other issue *but* natural gas aggregation.

The General Assembly clearly knows how to create an entity with broad-ranging powers to generally represent consumer interests in Commission proceedings—look no further than the broad powers entrusted to the Ohio Consumers' Counsel in Chapter 4911. OCC, of course, is already participating in this case, and indeed, its powers include not only the representation of residential customers, but also of municipal corporations (on request) in general rate-setting

matters. *See* R.C. 4911.15. The General Assembly clearly did *not* set out to create such an entity when it drafted R.C. 4929.26.

So even if NOPEC's claim were factually true—namely, that the POG authorized it to act as a general consumer representative in proceedings having no bearing on the aggregation program—it would be legally invalid. NOPEC's statutory authority does not go so far, and the POG would be invalid to that extent: the POG would not constitute an *appropriate* action under R.C. 167.03.

In sum: NOPEC derives no authority from R.C. 167.03(C) in and of itself. That statute requires the governing bodies to take additional implementing action, and the only implementing action that NOPEC points to is the adoption of the POG. But the POG was adopted under a statute that is limited to natural gas aggregation, a topic on which DEO's CEP application has no bearing. Relying on R.C. 167.03 to expand the scope of R.C. 4929.26 would violate the general canon of statutory interpretation that "when there is a conflict between a general provision and a more specific provision in a statute, the specific provision controls." *Blackstone v. Moore*, 155 Ohio St. 3d 448, 2018-Ohio-4959, ¶ 22. So even if the POG clearly authorized NOPEC to pursue its customers' general interests in any and all general rate-setting matters, the POG would be invalid and *ultra vires*, going drastically beyond the authorization contained in R.C. 4929.26.

B. Regardless of whether the law permits NOPEC to represent constituents in pure distribution cases, the implementing plan and municipal ordinances do not.

Even if its member communities could, as a matter of law, bestow on NOPEC the broad authority that NOPEC now claims under R.C. 4929.26, there would still be a question of fact whether the member communities actually did grant such authority to NOPEC to intervene in this case and other cases that concern distribution rates.

In its defense, NOPEC points to only one clause in one paragraph in its 22-page Natural Gas Aggregation Program POG for the authority to represent its member communities in cases before the Commission that solely concern a utility's distribution rate.

> Under PUCO orders, the local distribution company assigns the customer classification and corresponding character of service and associated regulated rates. These rates include a monthly customer charge, a distribution charge, and other applicable charges. Although *NOPEC may participate in regulatory proceedings and represent the interests of customers regarding these regulated rates*, it will not assign or alter existing customer classifications without the approval of the PUCO. The focus of the NOPEC Natural Gas Aggregation Program, as noted above, will be acquisition of competitive prices and terms for natural gas supply.

(POG at ¶ 2.5.2 Rates (emphasis added); *see* Rep. at 2.) There is no other substantive provision in the POG that NOPEC claims gives it a right to appear before the Commission on behalf of its member communities concerning distribution rates. Nor is DEO aware of one: such authorization does not appear in the Description of the Natural Gas Aggregation Program (¶ 1.2), not in the Natural Gas Aggregation Program Goals (¶ 2.1), not in the Natural Gas Aggregation Program Operations (¶ 2.2).

The clear and express focus of the POG, including the very provision cited by NOPEC, is the acquisition of "natural gas supply." The clause cited by NOPEC states that "the *focus* of the NOPEC Natural Gas Aggregation Program… will be acquisition of competitive prices and terms for natural gas supply." *Id*. This assigned focus is repeated throughout. Paragraph 1.2, for example, states, "The Natural Gas Aggregation Program involves the acquisition of competitive retail natural gas supply. *Distribution services (metering, billing, maintenance of the gas transmission and distribution system) will continue as the function of the local distribution company*." (Emphasis added.) Likewise, Paragraph 2.1, lists ten Program Goals, including "[t]o

acquire the best market rate available for natural gas supply"; not one goal in this section discusses the provision of distribution service.

NOPEC's notices are to the same effect. The Opt-Out Notice for DEO's customers and the Terms and Conditions of the supplier (NextEra Energy Services Ohio, LLC), which are attached to NOPEC's Renewal Certification Application, are similarly devoid of any discussion that the agency relationship between NOPEC and the customer pertains to distribution service. "We negotiate on the behalf of our members with gas and electric suppliers…," states the Opt-Out Notice. "All other functions, delivery, repair, billing, and customer service, will continue to be provided by Dominion Energy Ohio." (*Id*.)

The local ordinances confirm the limits of NOPEC's agency and authority to procuring natural gas commodity supply. (*See*, *e.g.*, Section 1, Village of Lakemore, Ohio, Ordinance Number 1646-2019, Case No. 02-1688-GA-GAG (June 24, 2019), adopting "the Plan of Operations and Governance of the NOPEC Gas Aggregation Program, for the purpose of establishing and implementing the Gas Aggregation Program in the Village"). Similar language appears in each ordinance filed in Case No. 02-1688 in the last year since NOPEC filed its renewal certification application in July 2018: the member community adopts the POG "for the purpose of establishing and implementing" a natural gas aggregation program.

Together, the POG, the notices, and the ordinance unmistakably establish that NOPEC's purpose and role is to act as an agent for member communities in connection with their Natural Gas Aggregation Program. While a single clause of a single sentence of the POG does contemplate participation in regulated proceedings, the POG does not contemplate such participation outside of a connection with the administration of an aggregation program, and that very sentence counsels that NOPEC should be focused on the "acquisition of competitive prices

and terms for natural gas supply." (POG at ¶ 2.5.2.) The POG certainly does not establish that NOPEC acts as agent for the member communities on any and all issues before the Commission, including cases solely affecting distribution rates.

The limited nature of the POG's authorization is consistent with the narrow purpose of R.C. 4929.26. The POG and implementing ordinances do not support NOPEC's involvement in this case.

C. Although NOPEC may properly intervene in distribution cases that affect commodity sales service or that otherwise affect its aggregation program, the CEP case presents no such connection.

To be clear, DEO is not suggesting that NOPEC could *never* properly participate in a distribution rate case. DEO recognizes that implementation and continuation of an aggregation program may require intervention in a Commission proceeding involving distribution rates. That appears to be the purpose of the sole provision of the POG cited by NOPEC, which permits involvement in regulated-rate proceedings, but otherwise reiterates that NOPEC's "focus" is to be on aggregation.

Base rate cases often directly affect the terms and conditions of commodity services, and can do so indirectly through changes to the price, terms, and conditions of transportation, storage, and pooling services. If DEO were proposing changes to any of those services, it likely would not oppose NOPEC's motion. DEO would understand that NOPEC's long-standing and legitimate interests were potentially affected.

But this case has nothing to do with commodity service or any service indirectly affecting it. This is a distribution case, pure and simple. DEO's proposal is for approval of a new rate, the CEP Rider, to be charged to end-use customers—period. DEO is not proposing *any* tariff changes or program changes, certainly nothing affecting the commodity-sales, transport, or

pooling functions. NOPEC does not claim otherwise; that is why it must make the claim that its authority stretches to general consumer advocacy in distribution proceedings.

There are plenty of entities active before the Commission who represent the interests of end-use consumers large and small. That is not NOPEC's role, and it has not explained why or how its participation is affected by or necessary to advance this proceeding.

D. NOPEC's participation in electric security plan proceedings does not support intervention in this one.

Finally, NOPEC claims that it has been granted intervention in numerous PUCO proceedings, including the electric security plan (ESP) proceedings of the FirstEnergy operating companies. (Rep. at 2-3.) NOPEC's Reply does not identify the issues that NOPEC raised in ESP cases or whether its intervention was opposed. But there is a striking difference in the scope of issues litigated in an ESP proceeding, and the scope of issues in this proceeding.

The core, mandatory purpose of an ESP proceeding is to establish a standard service offer, by its terms a "generation service." *See* R.C. 4928.143(B)(1) ("An electric security plan shall include provisions relating to the supply and pricing of electric generation service"). The price, terms, and conditions of generation service clearly and directly impinge on the concerns of an aggregator. Although an ESP "may" affect distribution service, *see id*. (B)(2)(h), that is not an essential feature of such a proceeding. So the fact NOPEC participated in an ESP case tells one nothing regarding the scope of its interests there or the propriety of its intervention here.

Unlike an ESP, this case does not raise any issues related to DEO's "standard service offer" or any other form of commodity sales service. Nor does this case address terms, conditions, or charges relating to customer shopping for retail natural gas supply service. This case concerns the recovery of DEO's CEP investments, and related post-in-service carrying costs (PISCC), depreciation expense, and property tax expense. The case purely concerns distribution

rates, indeed without many of the ancillary issues (e.g., revisions to general tariffs, transportation and pooling service, etc.) that are frequently addressed in general base rate proceedings. That NOPEC may have been granted intervention in an ESP case does not justify intervention here.

III. CONCLUSION

NOPEC does not have standing to intervene in this proceeding and cannot otherwise satisfy the Commission's criteria for intervention, including the authority to assert a protectable real and substantial interest. For the reasons stated in this Surreply and DEO's Memorandum Contra, the Commission should exercise its discretion to deny NOPEC's motion to intervene.

Dated: July 24, 2019

Respectfully submitted,

/s/ Christopher T. Kennedy

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Summary: Motion for Leave to File Surreply and Surreply in Opposition to Northeast Ohio Public Energy Council's Motion to Intervene electronically filed by Ms. Rebekah J. Glover on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio