

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The East Ohio Gas Company     )  
d/b/a Dominion East Ohio for Approval of an     )  
Alternative Form of Regulation.                     )

Case No. 19-0468-GA-ALT

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**NORTHEAST OHIO PUBLIC ENERGY COUNCIL’S AND  
OFFICE OF THE OHIO CONSUMERS’ COUNSEL’S  
JOINT MEMORANDUM CONTRA  
DOMINION ENERGY OHIO’S MOTION FOR LEAVE TO FILE SURREPLY**

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Dominion Energy Ohio (“DEO” or “Dominion”) wants to block the Northeast Ohio Public Energy Council (“NOPEC”) from advocating for customers in this case that could cost northeast Ohioans tens of millions of dollars annually. That is an affront to customers. Dominion’s latest effort against NOPEC’s motion to intervene and consumer advocacy is to seek permission to make even more anti-consumer arguments in a filing (a “surreply”) that is not permitted under the rules of the Public Utilities Commission of Ohio (PUCO).

Dominion took this extraordinary step to deny NOPEC its right to participate on behalf of its municipal, residential, and small business customers (which NOPEC represents). This extraordinary step is especially offensive to these captive customers considering that Dominion is attempting to increase the price they are required to pay for monopoly natural gas service – without their input. If that’s not enough, Dominion’s claimed right to file the surreply (which DEO attached to its motion prior to being granted leave) is based upon a misrepresentation, as explained below.

NOPEC advises that never before in the 68 cases in which NOPEC has intervened at the PUCO since 2001 has NOPEC’s intervention been opposed by the applicant utility company. No other intervener in this case represents the interests of municipalities, villages, townships and

counties, or the interests of small commercial customers which will be adversely impacted by Dominion's proposed rate increase.

DEO's conduct in this rate increase case to date is surprising. It does little to foster good will with the communities and customers it serves represented by NOPEC. NOPEC would think that DEO would welcome its municipal customers' participation, as this Commission and other utilities have done on a broad range of issues. For the reasons that follow, the Commission should deny DEO's motion for leave to file a surreply.

The Office of the Ohio Consumers' Counsel ("OCC") supports NOPEC's motion to intervene. The PUCO has benefited, for its decision-making in the public interest, from NOPEC's perspective in numerous other cases, and it should continue to benefit from that perspective here. The Ohio Supreme Court's instruction to the PUCO is that intervention in PUCO proceedings should be "liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO." *OCC v. PUCO*, 111 Ohio St.3d 384, 388 (2006).

**I. Dominion misrepresents that NOPEC raised for the first time on reply that it was intervening as a regional council of governments established under R.C. Chapter 167.**

Granting leave to file surreply is extraordinary relief outside of the Commission's rules and requires a showing of prejudice in order to be granted. *See, e.g., Time Warner Telecom v. Ameritech Ohio*, Case No. 02-796-TP-CSS, Order (November 10, 2004). To fulfill this requirement, DEO claims that, "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..." Motion at 2; Surreply at 3. Dominion's claim is patently not true. The first line of NOPEC's memorandum in support of its motion to intervene states, "The Northeast Ohio Public Energy Council ("NOPEC") is a regional council of governments established under R.C. Chapter 167..." The

memorandum in support proceeds to detail the hundreds of municipalities, townships and counties, and the hundreds of thousands of residential and commercial customers that NOPEC represents in that capacity, in DEO's service territory.

Because NOPEC stated in its motion to intervene the basis for its intervention as a regional council of governments under R.C. Chapter 167, DEO cannot show prejudice.<sup>1</sup> It had notice of, and the ability to contest in its memorandum contra, the basis for NOPEC's intervention. DEO simply neglected to do so. DEO does not deserve a second bite at the apple. Its Motion must be denied on this basis alone.

**II. NOPEC raised no issues for the first time on reply, but merely responded to Dominion's confusion as to the basis for NOPEC's intervention.**

Even a cursory review of DEO's memorandum contra NOPEC's motion to intervene shows that DEO ignored NOPEC's representation that it was intervening in its capacity as a regional council of governments under R.C. Chapter 167. Rather, DEO assumed that NOPEC's authority to participate in Commission proceedings is limited to issues affecting governmental aggregation of natural gas load. To correct DEO's misunderstanding, NOPEC found it necessary to explain on reply that it was not created under, and its authority is not limited by, R.C. 4929.26, as DEO assumed. Rather, NOPEC was created under R.C. Chapter 167 as a regional council of governments. R.C. 167.03(C) authorizes a council of governments to take a broad array of actions.

NOPEC notes that the council can take any action that an individual political subdivision could take under Ohio law. If an Ohio municipal corporation, village, county or township served by DEO can intervene in a DEO rate case at the PUCO, then NOPEC can do so as well in its

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<sup>1</sup> To the contrary, DEO's conduct has been prejudicial to NOPEC. DEO neglected to address NOPEC's status as a regional council of governments when it was supposed to in DEO's memo contra. In this pleading, DEO is improperly addressing NOPEC's intervention for a second time, and it will do so for a third time in a reply to this pleading.

capacity as a regional council under R.C. 167.03(C). In NOPEC's case, governmental aggregation is only one of those authorized actions. Another is representing those political subdivisions, and their constituents, in proceedings involving monopoly natural gas distribution rates.

NOPEC will be clear: R.C. 4929.26 authorizes governmental entities to aggregate their constituents' natural gas load and to do so jointly. R.C. 4929.26 does not prescribe the method for them to act jointly. Governments could enter into joint agreements limited to the aggregation of natural gas load, if they preferred. However, NOPEC member communities elected to create or join a regional council of governments to address issues of mutual concern, only one of which relates to the aggregation of natural gas load.

Unfortunately, DEO remains confused as to the distinctions between R.C. Chapter 167 and R.C. 4929.26. It asserts in its surreply that NOPEC alleges that *R.C. 4929.26* permits it to intervene in distribution rate proceedings. Surreply at 3-4. NOPEC will be clear; it has never made such a claim. NOPEC reiterates that the communities that make up its membership have the right to jointly aggregate natural gas load as provided in R.C. 4929.26. They can accomplish their joint activity through their membership in NOPEC. Similarly, they also have the right to engage in other mutual interests, including intervention in a distribution rate case. Their membership in NOPEC permits them to do both. Again, NOPEC emphasizes that if a municipality, village, township or county wishes to intervene in a distribution rate case (which they clearly can do individually), then so can NOPEC on their collective behalf. R.C. 167.03(C). That is all of the authority NOPEC needs to intervene in this case.

**III. Dominion also misrepresents the nature of the NOPEC member communities' ordinances and resolutions.**

DEO continues to misrepresent NOPEC's authority as a regional council of governments by claiming its member communities' authorizing ordinances and resolutions "confirm the limits of NOPEC's agency and authority of procuring natural gas commodity supply." Surreply at 8. DEO cites to the Village of Lakemore's ordinance filed with the Commission on June 24, 2019. The ordinance authorizes the village to adopt NOPEC's Plan of Operation and Governance ("POG"). A community is required to have a POG under R.C. 4929.26; thus, the ordinance adopting NOPEC's POG was filed to demonstrate the village's compliance with the law.

Further, NOPEC points out the following. DEO misrepresents NOPEC's authority by failing to disclose the other community ordinances and resolutions that require the community to join NOPEC and sign the NOPEC Agreement, adopt NOPEC's bylaws and NOPEC's Natural Gas Program Agreement ("Agreement"). Although not required to be filed with the Commission, many have been. *See, e.g.*, the Smith Township resolution adopting NOPEC's POG and including a copy of the NOPEC Agreement, filed July 11, 2019 in NOPEC's certification case, No. 02-1688-GA-GAG. The Agreement provides that NOPEC was established under R.C. Chapter 167 for the purpose of carrying out an electricity aggregation program and any additional program members may approve. Thus, NOPEC, as a regional council of governments, is not limited to providing electric aggregation service. It may also provide (obviously) natural gas aggregation services and take other actions authorized under Ohio law on behalf of its members, including participating in a distribution rate proceeding.

NOPEC points to its reply, where it advised that the POG approved by each member community recognizes that NOPEC will participate in regulatory proceedings involving distribution charges and represent the interests of its member communities and their constituents

regarding these regulated rates. POG at paragraph 2.5.2. DEO confusingly claims that NOPEC is relying on R.C. 167.03 to expand the scope of R.C. 4929.26, citing rules of statutory construction that generally provide that a specific statute (R.C. 4929.26) will prevail over a general statute (R.C. 167.03), if the two conflict. *See, e.g.,* R.C. 1.51.<sup>2</sup> DEO asserts that communities' authority to act jointly to aggregate natural gas load under R.C. 4929.06 precludes the communities from doing so through a regional council of governments under authority of R.C. Chapter 167. NOPEC's reply is simple: Dominion assertion is false. R.C. 167.03(C) permits a regional council of governments to perform any act a political subdivision could perform under Ohio law. R.C. 4929.26 authorizes joint aggregation by governmental entities and serves as the lawful basis for a regional council of government to perform that function on their behalf. The statutes at issue do not conflict.

Moreover, as stated by NOPEC in its reply, several of its political subdivision members requested that NOPEC participate in this distribution rate proceeding. NOPEC has shown it has the authority to intervene based upon that request pursuant to its authority under R.C. 167.03, which authority is confirmed in NOPEC's POG, approved by each member community.

**IV. Dominion is incorrect that NOPEC was permitted to intervene in electric security plan ("ESP") proceedings only because ESPs also addressed commodity sales services.**

DEO attempts to distinguish NOPEC's ability to participate in ESP cases from its ability to participate in distribution rate proceedings by claiming that ESP cases also address commodity sales services. Certainly, DEO is aware of the FirstEnergy companies' last ESP case, No. 14-1297-EL-SSO, in which the companies' distribution modernization rider ("DMR") was at issue.

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<sup>2</sup> R.C. 1.51 provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Rider DMR required all captive customers to pay for upgrades to the companies' distribution systems. NOPEC litigated that distribution rate issue before the Commission on behalf of its members. It also appealed the approval of Rider DMR to the Ohio Supreme Court and was successful, along with other parties, in having the unlawful rider overturned for the benefit of its members. Indeed, NOPEC currently is an intervening party in a single-issue case in which the FirstEnergy companies seek to require their captive customers to pay Rider DMR for another two years. See No. 19-361-EL-RDR. NOPEC's real and substantial interest in that case is that its member communities and their constituents are not required to pay an unlawful charge. NOPEC's intervention in distribution-related cases is not isolated to Rider DMR issues. NOPEC advises that it has intervened in approximately 68 cases before the Commission, including the FirstEnergy companies' recent application to approve a grid modernization plan. No. 17-2436-EL-UNC.

NOPEC also has protected its members' interests on broader policy issues. Mostly recently, it participated in the Commission's generic investigation of the impact of the Tax Cuts and Jobs Act of 2017 ("TCJA") on regulated utilities (No. 18-47-AU-COI), and intervened in the FirstEnergy's companies' case that proposed how they specifically would to implement the TCJA (No. 18-1604-EL-UNC). It had a substantial interest that the benefits of the tax cuts be passed through to its members and their constituents.

DEO claims that other organizations are capable of representing small and larger end users. Whether other organizations are capable of representing similar interests is irrelevant under the law regarding intervention. However, NOPEC asserts that it is uniquely situated to represent the interest of the NOPEC communities in DEO's service territory.

**V. Neither NOPEC, nor any other representative organization, is required to “prove” that its members authorized intervention in a Commission proceeding.**

NOPEC has detailed its authority to intervene in this proceeding twice, in its reply and now in this memorandum contra. It has authority under the law and upon the request of member communities. Although DEO attempts to raise every possible legal hurdle to prevent the NOPEC communities’ participation in this case, it concedes that NOPEC would have the legal ability to intervene in a distribution rate proceeding if it proves that its members actually granted NOPEC authority to intervene. Surreply at 4-5. NOPEC will not take that bait.

DEO’s position is akin to requiring DEO to prove that it had internal authorization to file its application in this proceeding. While the position easily can be dismissed as nonsense, it is concerning that DEO will go to such lengths to prevent its customers from participating in proceedings that affect their pocketbook. DEO’s argument, if accepted, could be made by it or other utilities to block the many other organizations appearing in their representative capacities before the Commission. . Indeed, taken to its extreme form, DEO’s argument would require the Retail Energy Supply Association (“RESA”), represented by the same counsel as are representing DEO in this case, to disclose which of its members actually were supporting RESA’s position advanced before the Commission.

**VI. Conclusion**

For the foregoing reasons, Joint Movants respectfully request that the Commission deny DEO’s motion for leave to file a surreply. NOPEC renews its request that its motion to intervene be granted.



Respectfully submitted,

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In accordance with Rule 4901-1-05, Ohio Administrative Code, 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 *Joint Memorandum Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 8<sup>th</sup> day of August 2019 by electronic mail.

/s/ Dane Stinson

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Summary: Text Northeast Ohio Public Energy Council's and Office of The Ohio Consumers' Counsel's Joint Memorandum Contra Dominion Energy Ohio's Motion For Leave To File Surreply electronically filed by Ms. Megan Zemke on behalf of Stinson, Dane