

**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) Case No. 19-0468-GA-ALT
an Alternative Form of Regulation.)

**DOMINION ENERGY OHIO’S REPLY IN SUPPORT OF
MOTION FOR LEAVE TO FILE SURREPLY**

In its response to Dominion Energy Ohio’s (DEO) opposition to Northeast Ohio Public Energy Council’s (NOPEC) intervention, NOPEC repeatedly expresses “offense” at DEO’s arguments concerning the limits of NOPEC’s authority and agency. DEO’s opposition is not an attempt to prevent participation of its customers in this proceeding. Nor is DEO’s opposition an attempt to force NOPEC to disclose the identity of elected officials who NOPEC says asked NOPEC to intervene.

DEO has an interest in the efficient processing of this case, and it is concerned that multiple parties representing similar (if not identical) interests will slow this case down. And to that end, DEO does not believe that NOPEC has established its right to participate. NOPEC has not demonstrated that its members have duly authorized NOPEC to intervene in this proceeding on their collective behalf. If they even could: the relevant statutes and NOPEC’s own documents demonstrate that NOPEC was established and authorized by local ordinances to negotiate and represent its members on issues concerning the price and procurement of the natural gas commodity. NOPEC points to no formal action by its members that extends its authority and agency to the cost of natural gas delivery service.

This is why DEO’s motion for leave to file a surreply must be granted—NOPEC has repeatedly failed to set forth relevant information supporting its intervention, and denying DEO an opportunity to respond to NOPEC’s continually evolving arguments would prejudice DEO.

For the good cause provided by DEO, DEO's motion for leave to file a surreply should be granted, and NOPEC's motion for intervention should be denied.

I. The Commission should permit DEO's surreply to prevent prejudice from NOPEC's evolving positions on its standing to intervene in this proceeding.

NOPEC says that DEO cannot show prejudice to support its motion for leave to file a surreply, "[b]ecause NOPEC stated in its motion to intervene the basis for its intervention as a regional council of governments under R.C. Chapter 167." (NOPEC Mem. Contra at 3.) A review of NOPEC's motion to intervene, however, shows that NOPEC's assertion is not true.

There is a single reference to R.C. Chapter 167 in the first sentence of NOPEC's memorandum in support of its motion to intervene: "The Northeast Ohio Public Energy Council ("NOPEC") is a regional council of governments established under R.C. Chapter 167..." (Mem. in Support at 1.) All that sentence does, however, is identify what NOPEC is. The sentence does not argue that R.C. Chapter 167 is the basis for intervention. Nor does that argument or one similar appear anywhere else in the sparse, two-page memorandum in support. Indeed, there is no mention of R.C. Chapter 167 in the entire discussion of the elements that the Commission may consider in reviewing motions to intervene. As DEO pointed out in its memorandum contra, NOPEC's bare-bones motion did nothing more than recite the factors identified in R.C. 4903.221(B) and OAC Rule 4901-1-11(A)(2) that the Commission may consider, and assert that "NOPEC has a substantial interest that its customers are assessed only reasonable costs for natural gas distribution service." (*Id.* at 2.) That effort did not put DEO on notice of the arguments and documents that NOPEC would subsequently offer.

It was only after DEO opposed NOPEC's intervention, on the grounds that DEO's application proposes no change to any service affecting NOPEC's role as an aggregator or affecting its customers' interests in the acquisition of the natural gas commodity, when NOPEC

introduced altogether new arguments concerning its rights and powers under R.C. Chapter 167. (NOPEC Reply at 2.) Moreover, NOPEC's reply (also for the first time) cited R.C. 4929.26 (the legislative authority for natural gas aggregation) and NOPEC's Natural Gas Aggregation Program Plan of Operation & Governance (POG). (*Id.*) NOPEC now claimed that R.C. 167.03 allowed it to take "many actions" on behalf of its member communities, and cited the single phrase from the POG ("Although NOPEC may participate in regulatory proceedings and represent the interests of customers regarding these regulated rates....") that NOPEC says authorizes it to stand in the shoes of its member communities to represent the interests of their constituents before the Commission in *any* pending matter. (*Id.*) And NOPEC revised the nature and extent of its interest as being "to fulfill its obligations to the residential and small commercial constituents of its DEO member communities by representing their interests in this regulatory proceeding that proposes a significant increase in distribution rates." (*Id.* at 3.)

NOPEC's suggestion that its initial motion's single, unadorned citation to R.C. Chapter 167 put DEO on notice of these new bases for NOPEC's intervention is not credible. NOPEC expressly admits as much when it asserts that it "has detailed its authority to intervene in this proceeding twice, in its reply and now in this memorandum contra." (NOPEC Mem. Contra at 8.) NOPEC is correct: it set forth an argument in support of authority two times, in its reply and its memorandum contra. But it did *not* do so in its *initial* motion to intervene.

Contrary to the intemperate language contained in NOPEC's response, DEO did not "misrepresent" NOPEC's motion to intervene or the limits of NOPEC's authority and agency. (NOPEC Mem. Contra at 2-3, 5.) A review of NOPEC's pleadings and operating documents demonstrates that DEO's surreply and opposition to NOPEC intervention are both justified. DEO is not taking "a second bite at the apple." (*Id.* at 3.) DEO is trying to take aim at an apple that

NOPEC keeps moving. DEO did not “ignore” the fact that NOPEC is created under R.C. Chapter 167. (*Id.*) It was only after DEO questioned NOPEC’s standing to intervene that NOPEC began to tease out the basis for its intervention. Nor did DEO “assume” that NOPEC’s authority to participate in Commission proceedings is limited to issues affecting governmental aggregation of natural gas load. (*Id.*) The relevant aggregation statute and NOPEC’s public statements corroborated the limited nature of NOPEC’s representation—a limited agency that NOPEC’s operating documents confirm.

Whatever action the Commission takes on the underlying request to intervene, it would clearly prejudice DEO not to permit it to address the arguments newly raised in NOPEC’s reply. The Commission should accept DEO’s surreply and fully consider the arguments concerning NOPEC’s intervention.

II. Yet another new argument set forth in NOPEC’s latest pleading also lacks merit.

Even now, in its memorandum contra to DEO’s request to file a surreply, NOPEC continues to change its story to attempt to justify its intervention, arguing now that R.C. 167.03 permits NOPEC to accomplish *any* “joint activity,” advance *any* “mutual interest,” or “perform *any* act a political subdivision could perform under Ohio law,” which its members wish NOPEC to undertake, including intervention here. (NOPEC Mem. Contra at 4-6 (emphasis added).) NOPEC cites no legal authority for this unlimited interpretation of R.C. 167.03. Nor does NOPEC address the clear statutory requirement that R.C. 167.03(C) can only be implemented by an “*appropriate* action of the governing bodies of the members.” (emphasis added). But the very documents that NOPEC cited in its memorandum contra do address this point and confirm the limited scope of NOPEC’s purpose and agency.

NOPEC’s operating agreements and bylaws, which define the organization’s purpose and programs, can be found in certain recent correspondence filed with the Commission. (*See, e.g.,*

May 6, 2019 NOPEC Correspondence re City of Cuyahoga Falls Ordinances, Case No. 02-1688-GA-GAG.) Here is what NOPEC’s own founding documents say about its purpose:

- “The Agreement establishing the Northeast Ohio Public Energy Council,” adopted November 8, 2000, (NOPEC Agreement) was entered into under R.C. Chapter 167 “for the purpose of carrying out a cooperative program for the benefit of the members acting as governmental aggregators to arrange for the purchase of electricity ... pursuant to the authority provided under Ohio Revised Code Section 4928.20.” (*Id.* at 1.)
- “The Bylaws Governing the Northeast Ohio Public Energy Council,” adopted November 29, 2000, (NOPEC Bylaws) confirmed that NOPEC was established “for the purpose of carrying out the Aggregation Program pursuant to Revised Code Section 4928.20.” (*Id.* at 1.)

As NOPEC suggests, the NOPEC Agreement and Bylaws did contemplate that NOPEC’s members could approve subsequent agreements to establish “additional programs” authorized under the laws of the State. To DEO’s knowledge however, NOPEC’s members have entered into only one additional agreement that authorized a natural gas aggregation program:

- The Natural Gas Program Agreement of the Northeast Ohio Public Energy Council authorized NOPEC, pursuant to Revised Code Chapter 167, “to undertake a natural gas opt-out program.” (*Id.* at 1.)
- NOPEC’s Natural Gas Aggregation POG also recognizes that R.C. 4929.26 allows NOPEC to enter into such an agreement to competitively acquire retail natural gas supply. (§ 1.1)

Thus, there are two NOPEC aggregation agreements authorized under two different state statutes entered into pursuant to R.C. Chapter 167. NOPEC cites these agreements in its memorandum contra. NOPEC, however, can point to no other agreements that its members have entered into under R.C. Chapter 167 that authorize additional actions. Rather, NOPEC can only point to: (1) the passing reference to distribution charges in the POG (§ 2.5.2); and (2) NOPEC’s unverified assertion that several elected officials in member communities have asked NOPEC to intervene in this proceeding. But these cobbled-together statements do not establish an “appropriate action” under R.C. Chapter 167 that would authorize NOPEC to advocate, on its collective

members' behalf, in this proceeding or any other Commission proceeding, on delivery rate issues that do not affect the aggregated purchase of electricity and natural gas. Indeed, NOPEC's own prior conduct suggests that an agreement, adopted by ordinance, to authorize an additional program is necessary before NOPEC can take any "joint" or "mutual" action for its members.¹

III. DEO's opposition to NOPEC's intervention is not an "extraordinary step" to "prevent" customers from participating in this proceeding. It is a challenge to NOPEC's claim that it has legal authority to advocate their interests in this case.

NOPEC complains that DEO's opposition to NOPEC's intervention is an "extraordinary step" to "prevent" customers from participating in this proceeding. (NOPEC Mem. Contra at 1, 8.) That is not the case, and not what DEO has argued. To be clear, DEO is not claiming that customers do not have a "real and substantial interest" in DEO's recovery of distribution costs in this proceeding. And contrary to NOPEC's suggestion, DEO is not seeking to increase the cost of natural gas service "without [customers'] input." (*Id.* at 1.) It is simply DEO's position that NOPEC is not the party who should be asserting an interest in this case on their behalf. This is not an "anti-consumer" argument. (*Id.*) It is a challenge directed at NOPEC's assertion that it legally can advocate for customers concerning the issues raised by DEO's application. NOPEC was established to aggregate the purchase of electricity, and then later its authority was extended to aggregation for the purchase of natural gas. NOPEC's role was never intended and defined by

¹ NOPEC claims that DEO argues that NOPEC must offer proof of "internal authorization" to intervene in this proceeding. (NOPEC Mem. Contra at 8.) That is not DEO's argument. DEO contends that NOPEC has not demonstrated that its members have taken "appropriate action" under R.C. 167.03(C) to authorize NOPEC's authority and agency beyond issues concerning the aggregation of the natural gas commodity. Contrary to NOPEC's assertion, DEO is not asking NOPEC to disclose which members support NOPEC's intervention. DEO is arguing that NOPEC has not established that it has been authorized to intervene on its members' collective behalf, nor that it could do so consistent with R.C. 4929.26. The unverified assertion that some elected officials asked NOPEC to intervene and the one passing reference to Commission rate proceedings in the POG is not sufficient "appropriate action" under R.C. Chapter 167, especially given the other written agreements that NOPEC has asked its members to adopt formally through local ordinances.

its members to include the representation of their constituents in proceedings concerning delivery rates. Nor is such a role consistent with the statutory authorization contained in R.C. 4929.26. NOPEC cannot show that it has the legal authority to assert and represent the interests of DEO's customers in this specific proceeding. Without that authority, NOPEC has not met its burden for intervention in this proceeding.

That no utility has challenged NOPEC's intervention in a prior Commission proceeding does not mean that NOPEC has been given *carte blanche* to participate in every matter pending before the Commission. All it means is that NOPEC cannot identify a single prior Commission order that has found in NOPEC's favor in a contested intervention. DEO does not dispute NOPEC's role of advocating on its members' behalf concerning the procurement of electricity and natural gas. The dispute is whether NOPEC can advocate on its members' behalf on issues that go beyond the aggregation programs that state law and local ordinances have authorized, and even beyond the provision and procurement of commodity sales service. DEO showed that the relevant statutes and NOPEC's own documents contradict NOPEC's claims.

For the good cause provided herein and in DEO's other pleadings, DEO requests that the Commission exercise its discretion to grant DEO's motion for leave to file its Surreply and to deny NOPEC's motion to intervene in this proceeding.

Dated: August 15, 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 August 15, 2019:

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Summary: Reply Reply in Support of Motion for Leave to File Surreply electronically filed by Mr. Christopher T Kennedy on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio